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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73 - 5993

JOHN E. TEST, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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December 24, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioner John E. Test respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 1, 1973.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado.

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Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 1, 1973. A timely petition for rehearing was denied on November 26, 1973, and this petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. § 1867(d) in support of a motion to quash the jury and upon the presentation of a prima facie claim of constitutional dimension, i.e., the systematic exclusion of Mexican-Americans from the jury array?

2. Does the concept of Due Process require that upon the presentation of a constitutional claim of systematic exclusion from the jury array of Mexican-Americans, a defendant be afforded a hearing on this claim, and does the concept of Due Process require the Government to bear the burden of explaining away this prima facie claim?

3. Must a trial judge respond with concrete, direct answers to queries from the jury during its deliberations when the jury makes clear that it is confused concerning the law to be applied to the case it is considering?

4. Should a mistrial be declared when the prosecutor makes comments in his closing argument concerning other crimes and the consequences of acquitting a defendant, and when he comments on the veracity of the defendant?

Statutory Provisions Involved

United States Code, Title 21, Section 841(a)(1), provides in pertinent part:

> "(a) Unlawful acts.
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally
> (1) to manufacture, distribute, or dispense, a controlled substance."

United States Code, Title 28, Section 1867(a), (d), and (f) (see Appendix, p. 12)

Statement of the Case

Petitioner was charged in a one-count indictment filed in the District Court for the District of Colorado with having distributed lysergic acid diethylamide (L.S.D.) in violation of 21 U.S.C. § 841(a)(1). Following a trial to a jury of twelve, Petitioner was found guilty and was sentenced to imprisonment for eighteen months. Upon direct appeal pursuant to 28 U.S.C. § 1291, the Court of Appeals

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for the Tenth Circuit affirmed the judgment of the district court.

The Government relied at trial upon the testimony of I. H. Allen, an undercover agent for the Bureau of Narcotics and Dangerous Drugs. He testified that he had met Petitioner through a Peter Brophy, and that he had been falsely introduced as a ski instructor and a former associate of Brophy's in the importation of marajunana from Mexico into California. He attempted to convince Petitioner to secure him cocaine, and when this failed, he asked for other drugs and showed Petitioner a large amount of money -- either fifteen or fifty thousand dollars. Finally the Petitioner sold Allen one thousand tablets of suspected mescaline. These turned out, upon analysis, to contain L.S.D. rather than mescaline.

Petitioner relied at trial upon the twin defenses of entrapment and lack of intent to distribute L.S.D. It was established that Brophy was a Government informer, that he had built up a friendship of several months' duration with Petitioner, and that he had regaled Petitioner with stories (apparently false) of his high adventure in the drug trade and great profits. Petitioner contended that it was only because of Brophy's friendship and the constant prodding of agent Allen that he had given Allen the drug in question. He made a profit of fifty dollars on the transaction. He also testified that he had thought that the tablets which he purchased and turned over to Allen contained mescaline rather than L.S.D. He

had even tested the tablets to make sure of this, for he did not want to give anyone L.S.D., for he felt the latter was a dangerous drug and he had had a bad experience with it in college. The Court of Appeals held that neither of these defenses had been established as a matter of law, and that there was sufficient evidence to support the jury's verdict. See pp. 6, 9-10 of Appendix hereto.

During its deliberations below, the jury sent several notes to the trial court. One inquired whether L.S.D. and mescaline were interchangeable for purposes of conviction, and the second asked whether Brophy could be considered a Government agent in regard to the entrapment issue. The trial court refused a suggestion by defense counsel to reply to the first query that the two substances were not interchangeable, and instead the court told the jury that its question could not be answered. In reply to the second question, the court instructed the jury to rely on its memory of the evidence and the court's prior instructions, though the latter had contained no reference to Brophy. Petitioner contended that these responses were misleading and erroneous, but the Court of Appeals, without addressing the issue directly, held it to be of "no merit." See p. 10 of Appendix hereto.

During his closing argument to the jury, the attorney for the Government made reference to the implications of finding the Petitioner not guilty; he also referred to crimes such as murder and hijacking, and he told

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the jury that the Petitioner had lied when he had testified. Petitioner contended below that these comments were highly prejudicial and improper, but the Court of Appeals, again without addressing the issue directly, disagreed. See p. 10 of Appendix hereto.

Prior to the trial below, Petitioner filed through counsel a motion to dismiss the inductment because of the systematic exclusion of certain cognizable groups -- Mexican-Americans, blacks, students, and persons under the age of thirty-five -- from the master and qualified jury wheels in the district court. Accompanying this motion was a motion to inspect the jury lists, and an affidavit presenting factual statements of such discrimination. The district court denied these motions, though it acknowledged that Mexican-Americans were significantly underrepresented on the district court's jury array. Petitioner contended that he had made a valid constitutional attack and that he had complied with the requirements of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. The Court of Appeals, again without comment, affirmed the district court's denial both of access to the critical jury lists as well as the denial of a hearing on the motion to dismiss the indictment. See p. 10 of Appendix hereto.

Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS WITH RESPECT TO THE MEANS FOR CHALLENGING A JURY.

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., provides a statutory method for challenging a jury array. See p. 12 of Appendix hereto. Briefly, the requirements of the Act are that (1) a motion must be filed prior to the voir dire examination of the prospective jurors, and (2) this motion must be accompanied by a sworn statement of facts, which if true, would constitute a failure to comply with the provisions of the Act. 28 U.S.C. § 1867(a) and (d). Upon the presentation of such a statement, a defendant is to be given access to the relevant jury documents which are not otherwise avail le to the public. 28 U.S.C § 1867(d) and (f). Petitioner's counsel herein complied with these requirements for he filed both a motion to dismiss the indictment and/or quash the array, in which he alleged that certain cognizable groups were systematically excluded, and he accompanied this motion with an affidavit showing that the Plan for Jury Selection utilized by the district court resulted in the gross underrepresentation of Mexican-Americans and persons under the age of thirty. (See the Record on Appeal, vol. II, p. 26-31 and p. 13-14 of Appendix hereto.) This affidavit contained a statistical analysis of one of the five primary counties which constituted the pool from which persons were drawn for the array in the district court. Despite this presentation, the district court denied both the motion to inspect the jury records as well as the motion to dismiss the indictment and/or the array. In so doing,

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the district court acknowledged that Mexican-Americans were significantly underrepresented in the array, but the court denied counsel both an opportunity to inspect the relevant documentation, and the court additionally prevented counsel from having a hearing on Petitioner's motion to dismiss the indictment and/or quash the array. (See Record on Appeal, Supp. vol. II, p. 13-14, 17-18.) The Court of Appeals did not address this issue in its opinion other than to note that it considered the issue to be without merit. See p. 10 of Appendix hereto.

The decision below is thus in conflict with decisions of other circuits. The Ninth Circuit has stated in United States v. James, 453 F.2d 27 (9th Cir. 1971) that a sworn statement must be filed under 28 U.S.C. § 1867(d). In another decision from the same court, the requirement of a sworn statement was bypassed because defense counsel had orally articulated his grounds for his motion at the time of argument before the district court; additionally, the Government did not object to the lack of such statement. United States v. Ware, 473 F.2d 530 (9th Cir. 1973). Still a third decision, United States v. Beaty, 465 F.2d 1376 (9th Cir. 1972), allowed discovery of the jury records without the filing of a sworn statement. Here counsel filed an affidavit which clearly conformed to the requirements of the Act, and yet discovery of the jury records was still not allowed.

More importantly, it was argued below not just that the Plan for Selection resulted in a jury array that did not conform to the requirements of the Act, but also

that the array was selected in a means that denied Petitioner his constitutional right to a jury drawn from a fair cross-section of the community. Thiel v. Southern Pac. Co., 328 U.S. 217 (1946). The Jury Selection and Service Act provides that failures to comply with the methods set out in § 1867 do not bar constitutional challenges to the jury array. See the House report to § 1867, which states that § 1867 was not intended to "preclude any person or the United States from asserting rights created by other statutes or for enforcing constitutional rights." 1968 U.S. Code Cong. & Admin. News 1806. Thus, even assuming arguendo that the affidavit filed by Petitioner's counsel in apparent compliance with § 1867 was not sufficient, a prima facie constitutional challenge was made when the trial court acknowledged that Mexican-Americans were significantly underrepresented in the jury array of the district court.[1] Once this prima facie claim was

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[1]At the hearing on Petitioner's motion to inspect the jury records, the district judge said:

> "I concede to you, Mr. Gerash, that there are not--the percentage of Chicanos selected for jury service under the system that we utilize is less than the population of the Chicano people in any given county -- I wouldn't say in any given county, but in most, so we concede that. We are starting with that, so what you are looking at, the master jury wheel will prove. It will prove what we concede, so the record shows that. ...
>
> "You are not going to have a hearing in this case. If you want to look at the jury list some time, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that. (Record on Appeal, Supp. vol. II, p. 13-14, 17.)

Despite this acknowledgment, the trial court denied all motions with respect to the jury, without a hearing. (Record on Appeal, Supp. vol. II, p. 17, 18.)

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made out, it was error to deny access to the jury records and to deny a hearing on the motion to dismiss and/or quash. The Court of Appeals for the Fifth Circuit has recently faced this exact issue in United States v. De Alba-Conrado, 481 F.2d 1266 (5th Cir. 1973). There counsel for the defendant waited until the jury had already been empanelled and sworn before asserting a challenge to the array on the basis of the exclusion of persons with Latin surnames. The trial court there denied the motion but invited defense counsel to renew the motion after trial, if necessary. No renewal was made and this point was not raised in defendant's motion for a new trial. The Fifth Circuit therefore held that any statutory challenge to the array had been waived by failing to comply with the timeliness requirements of 28 U.S.C. § 1867(a). However, the Fifth Circuit held that the challenge made had significant constitutional implications to require remand. 481 F.2d at 1270. In addition, the court stated that the defendant on remand should be given a complete and fair review of his contentions, and the court reaffirmed the following statement made in Mobley v. United States, 379 F.2d 768, 773-774 (5th Cir. 1967):

> "We believe the District Judge erred, therefore, in not permitting inspection of the questionnaires. This evidence, designed to show the ratio of Negroes to whites on the jury lists, is pertinent to an inquiry into the question of whether there has been a systematic exclusion of Negroes because of race. While this proof is not necessarily controlling, it is, nevertheless, an important factor of

> substantial value and should be considered by the Court in connection with other evidence pertaining to the method of selection of persons on the jury lists. Confidentiality of the jury questionnaires must accordingly yield to this major consideration."

The Court of Appeals for the Second Circuit has ruled in United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), that no discovery or hearing were necessary. However, that case involved a challenge based upon the alleged underrepresentation of persons between the ages of 24 and 30 and the total exclusion of 18-20 year old persons. The Second Circuit found that such challenges, even if true, were insufficient under the Act, and were not of constitutional dimension. The instant case, however, involves a clear constitutional claim of exclusion of an ethnic group, Hernandez v. Texas, 347 U.S. 475 (1954), and therefore the Guzman rationale for denying discovery and a hearing cannot apply.

Inasmuch as a prima facie showing of unconstitutional exclusion of Mexican-Americans was shown,[2] it was error both to deny counsel an opportunity to inspect the pertinent jury records and also to deny Petitioner a hearing on his motion to dismiss the indictment and/or quash the array.

In addition, the trial court was apparently

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[2]It was never doubted or challenged below that Chicanos, or Mexican-Americans, constituted a separately identifiable ethnic group. Cf. Hernandez v. Texas, supra; Muniz v. Beto, 434 F.2d 697, 701 (5th Cir. 1970).

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under the impression that it was Petitioner's burden to demonstrate the systematic exclusion of a cognizable group (though it is unclear how such proof is to be accomplished if access to the jury records is denied). However, decisions of this Court and of the courts of appeals make clear that once a prima facie claim of constitutional dimension has been established, the burden shifts to the Government to explain away, if possible, the exclusions in question. Alexander v. Louisiana, 405 U.S. 625, 631-632 (1972); cf., United States v. Williams, 421 F.2d 529, 531 (8th Cir. 1970); Black v. Curb, 464 F.2d 165, 168 (5th Cir. 1972); Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971); Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972).

Because of the importance of the questions of the right to trial by a jury drawn from a cross-section of the community and how to secure such right, and because of the conflict with decisions of other courts of appeals and this Court, this Court should grant the writ to review the judgment below.

2. THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THIS COURT CONCERNING THE REINSTRUCTION OF THE JURY.

During its deliberations below, the jury sent out six notes of inquiry to the trial court. Only the responses to two of these notes were challenged below by Petitioner. One inquiry concerned whether L.S.D. and mescaline were interchangeable for purposes of conviction.

The trial court initially proposed to answer that they were not, but that both were Schedule I controlled substances. When Petitioner's counsel requested that only the first part of the proposed answer be given, the trial court instead informed the jury that its question could not be answered. (Record on Appeal, Supp. vol. I, p. 50, 55.) The second query related to Peter Brophy's status in relation to the entrapment issue, namely, whether he could be considered a Government agent. The court's instructions had not referred to Brophy, but had merely briefly mentioned Government "officers" or "agents." (Record on Appeal, Supp. vol. I, p. 40, 41.) The trial court agreed that the evidence was undisputed on this point, but the judge felt that he had covered the issue adequately in his instructions. The court therefore told the jury that it would have to rely on its memory of the evidence and the instructions already given. (Record on Appeal, Supp. vol. I, p. 58.) Petitioner contended below that these failures to alleviate the jury's problems necessitated reversal under this Court's decision in Bollenbach v. United States, 326 U.S. 607 (1946). The Tenth Circuit did not address itself directly to this issue in its opinion below, but instead merely found it to be without merit. See p. 10 of Appendix hereto.

Bollenbach was a case involving a prosecution for transporting securities in interstate commerce knowing them to have been stolen, and for conspiracy to commit such offense. After the jury had been in deliberation

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for seven hours, it sent out a note asking in effect whether a conspiracy could continue after the object of the conspiracy had been completed. The trial judge gave an unresponsive answer, and the jury sent out a second inquiry concerning the effect of knowledge that the bonds in question were stolen. The trial judge responded with an instruction that possession of stolen property in a state other than that in which they had been stolen raises a presumption that the possessor both stole the securities and transported them in interstate commerce. The Second Circuit found this instruction to be highly erroneous, but nonetheless sustained the conviction on a theory of accessory after the fact, even though the defendant had not been charged with such an offense. The Government argued before this Court that the instruction given by the trial judge was merely a "cursory, last minute" instruction on the question of the necessity of knowledge of the stolen character of the securities. This Court, per Justice Frankfurter, held that particularly since the instruction was a "last minute" one, the duty of the trial judge was made all the greater.

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. * * *
>
> "Discharge of the jury's responsibility for drawing appropriate con-

> clusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong." 326 U.S. at 612-613.

This Court further held that the jury could not be expected to ignore bad law if such were given to it by the court, and while the evidence against the defendant was strong, this Court said that

> "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. at 614.

In the instant case, both of the jury's inquiries concerned vital issues in the case. One concerned the entrapment issue, and the other the question of intent. In regard to the entrapment question, the judge did not question but that Brophy was a Government agent. The Government argued below that since it was unclear from the record exactly when Brophy became a Government informer, it was proper for the trial court to refuse to instruct the jury on this question. However, it was clear that Brophy was in the employ of the Government, and he played an integral role in the dealings with the Petitioner. It was Brophy himself who testified that he and agent Allen were

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interested in Petitioner only because they thought he might know some "big dealers," though Petitioner himself was of no importance. (Record on Appeal, vol. I, p. 110.) Because of this, the Government cannot disavow Brophy and say that he was not an agent. Sherman v. United States, 356 U.S. 369, 373-375 (1958); United States v. Bueno, 447 F.2d 903 (5th Cir. 1971); United States v. Place, 263 F.2d 627 (2d Cir. 1959). Similarly, with respect to the question of intent and whether mescaline and L.S.D. were interchangeable, the trial judge's response was equally vital. Other courts have held in the context of the offense of fraudulently and knowingly importing a narcotic drug that the knowledge of the nature of the drug was crucial. United States v. De La Cruz, 420 F.2d 1093 (7th Cir. 1970); United States v. Christmann, 298 F.2d 651 (2d Cir. 1962). Nonetheless, the trial judge failed to give a meaningful response to either of these questions. The trial judge therefore clearly failed to fulfill his duty of "clearing away" the jury's difficulties. Bollenbach v. United States, supra, at 612-613.

In a similar context, the Court of Appeals for the Ninth Circuit has held that plain error occurred when a trial judge did not give a sufficient answer to a jury's inquiry. Powell v. United States, 347 F.2d 156 (9th Cir. 1965). The Ninth Circuit there said:

> "It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that

> these fairly presented the issues. The ultimate question is 'whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.' (citations omitted) As we have noted, the jury's inquiry showed the initial charge left the jury confused. A rereading of a portion of that charge which was not clearly responsive to the jury's inquiry could scarcely have clarified the matter in the juror's minds. Clear error occurred, requiring reversal." 347 F.2d at 158 (footnotes omitted).

Accord, United States v. Silver, 457 F.2d 1217 (3d Cir. 1971); Perry v. United States, 422 F.2d 697 (D.C. Cir. 1969); United States v. Harris, 388 F.2d 373 (7th Cir. 1967).

If an insufficient supplemental charge necessitates reversal, so should a supplemental charge that gives no illumination to two vital questions. Because of the importance of this question to the administration of criminal justice in the federal courts, and in order to rule on the continuing vitality vel non of the Bollenbach line of cases, this Court should grant the writ to review the judgment below.

3. THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF THE SCOPE OF PROPER ARGUMENT BY A PROSECUTOR.

In his closing argument to the jury, the attorney for the Government made the following comments:

> "We're not arguing that [Petitioner] has never committed these crimes before. What Mr. Gerash is telling you is that he has never been caught before, so set him free on the first time he is caught. And, of course, he will argue that to the next jury, if there is another jury. Well, [Petitioner] has never been caught before, so you should set him free again. Right. Because if nothing happens here, if he were not convicted here, it's as if he's never been caught before. Do we let the person, the murderer, kill one for free? Do we let the hijacker steal one airplane for nothing because --" (Record for Appeal, Supp. vol. I, p. 31.)

After objection by Petitioner's counsel, the trial judge instructed the jury that neither a murder case nor a hijacking were being tried, but rather the single-count indictment before them. However, later in that same argument, Government counsel stated:

> "When [Petitioner] has already lied to you about giving pills to Mr. Brophy; when he's already lied to you about the number of times he met with Agent Allen; when he's already lied to you several times in his testimony, how can you believe him?" (Record on Appeal, Supp. vol. I, p. 33.)

In his brief below and in oral argument, counsel for the Government admitted that such comments were improper, but he urged that they were proper "in context." Petitioner asserted below that nothing that had been said by his counsel could properly be considered to have provoked the above comments. The Tenth Circuit did not address this issue other than to comment that it was one of several without merit. See p. 10 of Appendix hereto.

This Court has previously stated the duties of a U.S. Attorney and the standards by which he is to be

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judged:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935).

Several courts of appeals have condemned comments such as those made by counsel for the Government herein. In United States v. Schartner, 426 F.2d 470 (3d Cir. 1970), the Government attorney stated:

> "I say to you with all the sincerity I can muster that if you do not convict the defendant the guilty will escape."

The Third Circuit there reversed the conviction, not only because the remarks implied a personal belief in the defendant's guilt, but also because the jury was asked to rely on the Government attorney's experience in prosecuting criminal cases. Similarly, in United States v. Fullmer, 457 F.2d 447 (7th Cir. 1972), the Seventh Circuit reversed a conviction because of the U.S. Attorney's remarks about other crimes, specifically snipings

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and other disturbances caused by weapons. In United States v. Cummings, 468 F.2d 274 (9th Cir. 1972), the Ninth Circuit condemned an "astonishing performance" by the U.S. attorney who had commented on the "checks and balances" in the U.S. Attorney's office. The court there said:

> "Its purpose could only have been to persuade the jury to convict, regardless of how weak the government's evidence might be; to persuade the jury that the defendant must be guilty, else he would never have been indicted. After such an argument, where is the presumption of innocence, where the requirement that the jury consider only the evidence in the case, where the government's burden to prove its case beyond a reasonable doubt? We have difficulty imagining an argument less proper or more surely prejudicial." 468 F.2d at 278.

Accord, Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Lamerson, 457 F.2d (5th Cir. 1972); United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969); United States v. Dellinger, 472 F.2d 340, 389-391 (7th Cir. 1972); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960).

In order to determine this vital question of the scope of proper closing argument by the U.S. attorney, a question which by the number of cases reported is evidently constantly recurring, this Court should grant the writ to review the judgment below.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1973

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	
v.	)	No. 73-1337
JOHN E. TEST, Defendant-Appellant	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. 72-CR-352)

James L. Treece, United States Attorney, and J. Terry Wiggins, Assistant United States Attorney, Denver, Colorado, for Appellee

Louis M. Fischer, Denver, Colorado and Walter L. Gerash, Denver, Colorado, for Appellant

Before CLARK*, Associate Justice; SETH and McWILLIAMS, Circuit Judges.

* Associate Justice, United States Supreme Court, Retired, sitting by designation.

PER CURIAM

Appellant John E. Test was convicted by a jury on a one count indictment charging him with knowingly and intentionally distributing a controlled substance, to wit: Lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 841.[1] On this appeal Test presents several questions but only two have substance, i.e., (1) Was Test entrapped as a matter of law and (2) Did he have the specific intent required by the statute. We have concluded that neither point has merit and, therefore, affirm the conviction.

1. Facts and Circumstances:

John Test first met Peter Brophy, the Government informer, in October, 1971, as a customer at Brophy's fish market, Seafood Limited, located in the Happy Canyon Shopping Center in Denver, Colorado. During the next several months Test and Brophy developed a friendship. Test performed odd jobs at Seafood Limited and he and Brophy drank beer together occasionally; Test was invited to Brophy's home and met his wife. It appears that at various unspecified times Brophy told Test that he had prior dealings in smuggling marijuana from Mexico to California, that he was a pilot and had used a plane to bring the contraband into the United States, and that he had invested his illegal profits in Seafood, Limited. None of Brophy's accounts of his trafficking in illicit drugs was true.

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By February 24, 1972, the relationship having continued, Brophy told Test that he would like to have a few tablets to give some friends; and Test obligingly produced seven tablets in a tinfoil packet which he said were "probably mescaline and acid." Brophy turned the tablets over to Agents Ercole and Lochridge of the Bureau of Narcotics and Dangerous Drugs; and a laboratory test revealed that they were LSD cut by a large amount of stearic acid. Test denied giving the tablets to Brophy. On March 13, 1972 Brophy called Agent Allen of the Bureau and arranged for Allen to come to Seafood Limited to meet Test. Neither Brophy nor Test had met Allen previously. Allen posed as Tom Stone, a ski instructor at Aspen and former associate of Brophy in the drug traffic in California. Allen testified that he told Test that he wanted to buy some cocaine and that Test told him "he had a connection for cocaine who could sell pound quantities . . ." quoting a price of $11,000 per pound. They discussed the purchase of approximately two to five pounds. In addition Test said he "could supply . . . marijuana, hashish, LSD and amphetamines." No sale or distribution was made at this meeting.

A second meeting between Agent Allen and Test occurred on March 15, 1972. While Brophy's part in the meeting is somewhat hazy, it appears that he overheard "a lot of the talk" but was not an active participant. Test told Allen that "there would be a delay in the delivery of the cocaine" but that "he had been successful in reducing the price of cocaine from

$31,000 to $10,000 and that he "had access to 10 pounds of marijuana which he would be willing to sell for $[illegible] a pound." As to cocaine, the two discussed a purchase price of $32,000 for four pounds. Apparently both parties then endeavored to make a showing of good faith. Agent Allen displayed $35,000 in Government funds (Test claimed it was $50,000) in the trunk of his car. Test gave Allen a marijuana cigarette saying that he hoped he enjoyed smoking it. When it became apparent, however, that Test could not produce any cocaine, Allen said: "I have to show my people something" and asked Test "if he could get any other substances." Test replied "that he might be able to get him some mescaline."

Subsequently, on March 27, 1972, Brophy contacted Agent Allen to set up a meeting for the purchase of 1,000 tablets of what was alleged to be mescaline. Allen met Test the next day at Seafood Limited. The sale was made inside a Government car parked in the shopping center parking lot. Allen paid Test $450 and received approximately 1000 tablets in a plastic bag. Test told Allen that the tablets "were stamped out by his friends" and that "he could get 50,000 tablets more." He testified that he had purchased the tablets two days earlier from two friends in Pine, Colorado paying $400 for them and leaving him a $50 profit on the deal.

Agent Allen testified that when he purchased the tablets, he believed them to be LSD. "Most of the drugs," he said, "that we have encountered that have been referred to as, chocolate mescaline as they were called, in fact turned out to be LSD." Subsequent laboratory analysis of the actual

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1,000 tablets established that they contained LSD cut by phencyclidine (PCP). The Government's expert witness, Mr. Ruyle, a forensic chemist with the Bureau of Narcotics and Dangerous Drugs, testified at the trial that he had analyzed more than five hundred separate samples of drugs denoted as mescaline but that they normally did not contain mescaline but were usually LSD by itself, PCP by itself, or LSD cut by PCP. He stated that PCP was a normal cutting agent for LSD.

2. Entrapment

Test asserts that he was unquestionably entrapped as a matter of law and should, therefore, have been acquitted. His claim is based on Brophy's alleged exploitation of their friendship to set him up for the drug deal with Agent Allen, Brophy's false stories of his prior drug exploits, his introduction of Agent Allen under false pretenses, Agent Allen's repeated requests for the production of drugs, and his showing of a large sum of money despite the fact that Brophy and Allen knew Test had no prior criminal record but kept after him on the theory that he might have known some large drug traffickers.

Entrapment is a "relatively limited defense." United States v. Russell, 411 U.S. 423 (1973). Entrapment as a matter of law is the more limited in terms of its availability. It is rudimentary that entrapment as a matter of law can only be found where it appears unmistakably clear to the [illegible] evidence establishes that the criminal design

originated with Government agents, was the product of their creative activity and was implanted in the mind of an otherwise innocent person totally lacking the requisite predisposition to commit the crime. Sorrells v. United States, 287 U.S. 435 (1932); Sherman v. United States, 356 U.S. 369 (1958).

In Sorrells, supra, the Supreme Court stated that when a defendant claims entrapment:

> "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451, 452.

In line with this concept, this court has exhaustively scrutinized the record examining the conduct of informer Brophy, of Special Agent Allen as well as the conduct and predisposition of Test. Construing the evidence in the light most favorable to the Government, as we are required to do, Glasser v. United States, 315 U.S. 60, 80 (1942), we are not persuaded that the conduct of the Government's agent and informer was so improper, overzealous or otherwise offensive as to amount to entrapment as a matter of law. As the Supreme Court said in United States v. Russell, supra: "Sorrells and Sherman both recognize 'that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution,' 287 U.S., at 441; 356 U.S., at 372. Nor will the mere fact of deceit defeat a prosecution, see, e.g., Lewis

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v. United States, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available." At 435-436.

Here, Test contends he was tricked and enticed by his friend Brophy -- their friendship exploited. There is no evidence in the record which conclusively establishes that Brophy was a paid Government informer when he first met Test. Nevertheless it is true that Test's friendship with Brophy had a bearing on Test's delivery of the seven tablets on February 24,1972 However, Test was not indicted or convicted for this distribution. Brophy did utilize his friendship with Test to introduce him to Agent Allen but thereafter played a decidedly unobtrusive role in the course of events leading up to Test's transaction with Agent Allen on March 28th. Neither this mere introduction nor his actions as a go-between for Allen and Test in arranging their meetings rises to the level of entrapment as a matter of law. Nor can Test successfully argue that his friendship with Brophy had such a compelling spillover effect on him vis-a-vis his relationship with Agent Allen that he was rendered powerless to distinguish between right and wrong or to refuse to cooperate with Agent Allen. Allen's requests for the production of drugs are a judicially acceptable tactic especially since the solicitations involved here were met with very little, if any, firm reluctance on Test's part. Furthermore, there is no evidence that Allen

threatened, cajoled or "sweated" Test. Indeed, Test volunteered extensive information about his drug connections, what types and quantities of drugs were available and presented Allen with various options and alternatives. Nor was Agent Allen's display of cash a fatal flaw in the case when viewed in the context of the negotiations at that point. It was merely a showing of good faith. Test's quid pro quo was the gift of a marijuana cigarette. Finally, all the evidence concerning Test's continuous pattern of illicit drug activities and his state of mind as revealed by his highly significant admissions at the trial is convincing proof that he was no cats-paw for Brophy but was in reality a drug trafficker. He fails to qualify as the "unwary innocent" victimized by a pernicious criminal scheme wholly manufactured by law enforcement officers. Sherman v. United States, supra, at 372. His lack of a prior criminal record, contrary to his claim, is not exculpatory.

Although the trial judge found, and we agree, that there was no entrapment as a matter of law in this case, the Government, citing Martinez v. United States, 373 F. 2d 810 (10th Cir. 1967), contends that Test was not entitled to have the entrapment issue submitted to the jury because he pled not guilty to the offense charged. Whether or not this be so as a general rule, [2] a matter we do not reach, it is clear that the Government's case here was in no wise prejudiced by the submission because the jury found with the Government.

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3. Specific Intent

Test's second line of defense is that he lacked the specific intent required by the statute to commit the offense for which he was convicted. He claims a judgment of acquittal should have been entered on the grounds that he did not knowingly and intentionally distribute LSD, "although he may have had the intent to distribute mescaline." At the trial Test testified that he told Agent Allen that he "might be able to get him some mescaline," that subsequently he "purchased the mescaline" for $400, that he sampled the tablets to be sure they were not LSD, and that he dispensed over one thousand tablets to Agent Allen on March 28, 1972, two days after he purchased them, for $450. He stated he knew LSD was illegal but "wasn't sure" about mescaline.

Unquestionably it is the province of the jury to pass upon guilt or innocence. Sinclair v. United States, 279 U.S. 749, 765 (1929). Where, as here, an essential element of the offense charged is the specific intent to commit it, the issue of intent is to be submitted to the jury. Screws v. United States, 325 U.S. 91, 106-107 (1945). Whether or not Test knew the character of the substance he was distributing or that his distribution was an illegal act is not for this court to say. It is the jury's function and duty to weigh the conflicting evidence and draw reasonable inferences therefrom in reaching its judgment. And any claimed ignorance of the law on Test's part is no excuse. United States v. International Minerals & Chemical Corporation, 402 U.S. 558 (1971).

We believe there was substantial credible evidence before the jury, both direct and demonstrative, from which it could justly reach its verdict, and we are bound to sustain it. Glasser v. United States, supra, at 80. To hold otherwise would precipitate a headon collision with the Seventh Amendment. U. S. CONST. amend. VII, Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., et al., 369 U.S. 355 (1962).

We have closely examined appellant's other contentions and find no merit in them. Accordingly, the judgment of conviction is affirmed.

Affirmed

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Footnotes

/1 21 U.S.C. § 841 provides in pertinent part:

> "(a) Unlawful acts.
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally---
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance".

21 U.S.C. § 812 specifies that Lysergic acid diethylamide is a Schedule I controlled substance.

/2 See, Sorrells v. United States, 287 U.S. at 439, 451-452.

28 § 1867

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(c)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both. As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

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STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

"EXHIBIT A"

WALTER K. GERASH, being first duly sworn upon oath, deposes and says:

On November 8, 1972, in the District Court in and for the County of Boulder, State of Colorado, in the case entitled People of the State of Colorado v. Florencio J. Granado, Criminal Action No. 5738, an all-day hearing was conducted. This hearing was based on a motion to quash the petit jury panel on the grounds that the voter registration lists plan of selecting jurors systematically excludes persons with Spanish surnames, youths under 30, students and workers. Prior to the hearing the District Attorney conceded the inspection of the qualified jury list.

At the hearing witness Marcela Trujillo, an expert in romance languages, identified a certain amount of Spanish surnames from the 8,000 qualified jury list. She testified that from the 8,000 there were 150 with Spanish surnames.

The 1970 U. S. Bureau of the Census figures disclosed that Chicanos 18 and over represent 5.42 percent of the total population of people in the age group in Boulder County. Those 21 and older made up 5.34 percent of the total population.

Then witness George Bardwell, a mathematician from the University of Denver, testified that the percentage of Chicanos on the jury list of 8,000 was 1.92 percent. Professor Bardwell said that the probability of 1.92 percent occurring by chance was as unlikely as getting six straight royal flush hands in poker. The mathematician further testified

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that people 18 to 30 years of age represented 33.30 percent of the total population of Boulder County while these people 20 to 30 years of age constituted 31.7 percent, according to the United States Census. However, the number of people in the 20 to 30 age group represented only 17.5 percent of the jury list. If jury members were truly selected at random, Professor Bardwell testified, that one can reasonably expect figures of 30.9 and 45.3 percent between 18 and 30.

These scientific findings have statistically exposed the voter registration lists as being unrepresentative of the defendant's peers. This is the voter registration list system used by the present plan of the United States District Court for the District of Colorado. There is probable cause to believe that there is the same systematic exclusion in the United States District Court and a hearing should forthwith be held after the qualified list is given to defendant's attorney for inspection so that a full fair hearing can be held.

The presiding judge also felt that there is systematic exclusion but denied the relief because the Supreme Court of Colorado stated that the voter registration list system should continue a year and refused to give full force and effect the existing legislation that called for supplementing the voter registration lists with other lists by March of 1972.

Walter L. Gerash

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STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me this 28th day of December, 1977, by Walter L. Grande.

My commission expires: 6/10/75

Notary Public

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Supreme Court, U. S.
FILED
AUG 5 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 27, 1973
WRIT OF CERTIORARI GRANTED JUNE 17, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 26, 1972 —United States Grand Jury for the District of Colorado returned indictment against Defendant for alleged violation of 21 U.S.C. § 841(a)(1).

January 2, 1973 —Defendant's Motion to Dismiss Indictment Because of Denial of a Fair and Impartial Jury, and Motion to Inspect, Copy and Reproduce the Master Jury Wheel and Qualified Jury Wheel, and Exhibit A filed in U.S. District Court for the District of Colorado.

January 23, 1973 —Hearing in District Court on Defendant's Motions, and Order entered denying opportunity to inspect master and qualified jury wheels, and denying Motion to Dismiss Indictment.

February 27, 1973 —Trial to jury commenced.

February 28, 1973 —Jury returned verdict of guilty.

April 6, 1973 —Judgment of conviction entered, and Defendant sentenced to custody of the Attorney General for eighteen months.

April 13, 1973 —Defendant's notice of appeal filed.

November 1, 1973 —Opinion and judgment of the Court of Appeals for the Tenth Circuit.

November 26, 1973—Rehearing denied in the Court of Appeals.

PLAN OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS

Filed October 4, 1968

Pursuant to the Jury Selection and Service Act of 1968, Public Law 90-274 the following Plan is hereby adopted by the Court subject to approval by a reviewing panel and to such rules and regulations as may be adopted from time to time by the Judicial Conference.

APPLICABILITY OF PLAN

The District of Colorado is hereby divided into divisions for jury selection purposes, pursuant to section 1869 (e) of the Act, as follows:

DENVER DIVISION, consisting of the counties of:

Adams	Gilpin	Phillips
Arapahoe	Grand	Sedgwick
Boulder	Jefferson	Summit
Chaffee	Lake	Teller
Clear Creek	Larimer	Washington
Denver	Logan	Weld
Douglas	Morgan	Yuma
Elbert	Park	

GRAND JUNCTION DIVISION, consisting of the counties of:

Archuleta	Hinsdale	Montrose
Delta	Jackson	Ouray
Dolores	La Plata	Pitkin
Eagle	Mesa	Rio Blanco
Garfield	Moffat	Routt
Gunnison	Montezuma	San Juan
		San Miguel

and PUEBLO DIVISION, consisting of the counties of:

Alamosa	Custer	Lincoln
Baca	El Paso	Mineral
Bent	Fremont	Otero
Cheyenne	Huerfano	Prowers
Conejos	Kiowa	Pueblo
Costilla	Kit Carson	Rio Grande
Crowley	Las Animas	Saguache

MANAGEMENT OF THE PLAN

This Plan shall be managed by the Clerk of the Court under the supervision and control of the Chief Judge or in his absence or inability to perform his duties as such, the District Judge who is present, in the District and who is next in precedence shall perform such duties.

RANDOM SELECTION FROM VOTER LISTS

Voter registration lists represent a fair cross section of the community in the District of Colorado. Accordingly, names of grand and petit jurors serving on or after the effective date of this plan shall be selected at random from the voter registration lists of all the counties within the relevant division. Where necessary, on direction of the Chief Judge, from the voter list or city directories or telephone books.

The selection shall be accomplished by drawing a starting number by lot and, commencing therewith on the voter registration list of each county in the division, selecting that name with the remaining names to be selected in multiples as ordered by the Chief Judge to produce the number of names required for the Master Jury Wheel. If, for example, the starting number drawn at random was number 25 and the ordered multiple was 50, the names selected in each county would be numbers 25, 75, 125 and so on throughout the county's voter registration list.

MASTER JURY WHEELS: The Clerk shall maintain a master jury wheel for each of the divisions within the district; he shall also maintain a Grand Jury

wheel for the district. The names of all persons randomly selected from the voter registration lists of the counties in a division shall be placed in the master jury wheel for that division. The minimum number of names to be placed initially in these master jury wheels shall be as follows:

1) Denver Jury Division. Four Thousand names or at least one-half of one per cent of the total registered voters for the designated counties, whichever is the greater.

2) Pueblo Jury Division. One Thousand names or at least one-half of one per cent of the total registered voters for the designated counties, whichever is the greater.

3) Grand Junction Jury Division. One Thousand names, or at least one-half of one per cent of the total registered voters for the designated counties, whichever is greater.

The Chief Judge may order additional names to be placed in the Master Jury Wheels from time to time as necessary.

Names shall be obtained for the Grand Jury Wheel from the three Qualified Jury Wheels of the respective divisions on a pro rata basis.

The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein provided between March 1 and September 30 in every odd numbered year beginning in 1971.

The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every three years between March 1 and September 30 beginning in 1972.

COMPLETION OF JUROR QUALIFICATION FORM

The Clerk shall mail to every person whose name is so drawn a juror qualification form, with instructions to fill out and return the form, duly signed, and sworn to, by mail within 10 days as provided by § 1864.

In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form within ten days.

Any person who fails to return a completed juror qualification form as instructed, after further notice from the Clerk, may be summoned, on direction of the Chief Judge, by the Clerk to appear forthwith before the Clerk to fill out the qualification form.

EXCUSES ON INDIVIDUAL REQUEST

The district court hereby finds that jury service by members of the following occupational classes or groups of persons would entail undue hardship or extreme inconvenience to the members thereof, and the excuse of such members will not be inconsistent with the law, and shall be granted upon individual request:

1) Persons over 70 years of age.
2) Actively engaged members of the clergy.
3) Women who have legal custody of a child or children under the age of 10 years.
4) Actively practicing attorneys, physicians, dentists, and registered nurses.
5) Persons who have served as a grand or petit jury in a state or federal court within the past two years.
6) School teachers in public, parochial, or private schools actively teaching.
7) Sole proprietors of businesses.
8) Any person who resides more than 100 miles or two hours travel time from the place of holding court if called to serve on a petit jury.
9) Any person who resides more than 49 miles from the place of holding court if called to serve on a grand jury.
10) Persons who have the sole care of others who are under disability.
11) Persons who do not have transportation available to attend court sessions.

EXEMPTION FROM JURY SERVICE

The district court hereby finds that exemption of the following groups of persons of occupational classes is in the public interest and would not be inconsistent with the Act, and accordingly members of such groups are barred from jury service:

1) Members in active service in the Armed Forces of the United States.
2) Members of the fire or police departments of any State, district, territory, possession or subdivision thereof.
3) Public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory or possession or subdivision thereof, who are actively engaged in the performance of official duties. Public officer shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

DETERMINATION OF QUALIFICATIONS, EXCUSES, AND EXEMPTIONS

(a) The Chief Judge on his initiative or upon recommendation of the clerk shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appeal in response to a summons, such facts shall be noted on said list.

(b) In making such determination the Chief Judge shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

QUALIFIED JURY WHEEL. The Clerk shall maintain separate qualified jury wheels for each division in the district, and shall place in such wheels the names of all persons drawn from the master jury wheel and not disqualified, exempt, or excused pursuant to this Plan. He shall insure that at all times at least 300 names are contained in each such wheel. Names drawn from the qualified jury wheel shall not be made public until the panel of jurors have been summoned and have appeared at the courthouse provided that the Chief Judge may order the names made public at an earlier date, or to be kept confidential in a case or cases when the interests of justice so require.

ASSIGNMENT TO PANELS

The panel of jurors summoned as petit jurors shall report in the jury assembly room. When a petit jury pool is used their names shall be placed in a jury wheel and shall be drawn therefrom at random in the number required by each of the respective judges holding court. Those so drawn shall report in that judge's courtroom. Those not selected to serve on a case, "left-over" jurors, shall return to the jury assembly room to be available for further assignment or to be excused on Order of the Chief Judge.

GRAND JURY PANEL

Names of persons for grand jury panels shall be publicly drawn at random from the Qualified Grand Juror Wheel of the District of Colorado as directed by the Chief Judge. Names placed in this wheel shall be obtained from the three Qualified Juror Wheels of the respective divisions on a pro rata basis.

JUROR QUALIFICATION FORM

The Jury Qualification Form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States shall be used.

Pending the approval of a proper form by the Judicial Conference of the United States, the attached unofficial questionnaire shall be used.

EFFECTIVE DATE: This Plan shall become effective after approval by the reviewing panel of the Judicial Council of the Tenth Circuit as such time thereafter as the panel shall direct.

DATED at Denver, Colorado, this 3rd day of September, 1968.

/s/ Alfred A. Arraj
ALFRED A. ARRAJ,
Chief Judge

/s/ Hatfield Chilson
HATFIELD CHILSON,
Judge

/s/ William E. Doyle
WILLIAM E. DOYLE,
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

IN THE MATTER OF
JURY SELECTION PLAN

ORDER MODIFYING PLAN

Filed April 25, 1972

The Jury Selection Plan of the Court was approved by the Reviewing Panel of the Judicial Council of the Tenth Circuit on September 18, 1968. It appears that Congress has enacted into law a reduction of the minimum age for Federal Jury service to age 18, and that our present plan should be modified to include a full representation of names of persons 18 years of age or older from the voters registered for the 1972 General Election, so that they may be adequately represented and included in the Qualified Jury Wheels, not later than October 1, 1973.

It is, therefore,

ORDERED, subject to the approval of the Review Panel of the Judicial Council of the Tenth Circuit, as follows:

1. That the Jury Selection Plan be modified by the repeal of that portion which reads as follows:

> "The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein provided between March 1 and September 30 in every odd numbered year beginning in 1971.
>
> The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every three years between March 1 and September 30 beginning in 1972."

2. That the Jury Selection Plan be modified and amended by the adoption and inclusion of the following:

> "The Master Jury Wheel for the Denver Jury Division shall be emptied and refilled as herein

provided between January 1 and September 1 in every odd numbered year beginning 1973.

The Master Jury Wheels for the Pueblo and Grand Junction Jury Divisions shall be emptied and refilled as herein provided every four years between January 1 and September 1, beginning in 1973."

3. That this modification of the Jury Selection Plan shall become effective upon the approval of the Review Panel of the Judicial Council of the Tenth Circuit.

DATED at Denver, Colorado, this 25th day of April, 1972.

BY THE COURT:

/s/ Alfred A. Arraj,
ALFRED A. ARRAJ
Chief Judge
United States District Court

PRESENT:

Alfred A. Arraj, Chief Judge
Hatfield Chilson, Judge
Fred M. Winner, Judge
Sherman G. Finesilver, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 72-CR-352

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN E. TEST, DEFENDANT

MOTION TO DISMISS INDICTMENT BECAUSE OF DENIAL OF A FAIR AND IMPARTIAL JURY

Filed January 2, 1973

COMES NOW the above-named defendant, by and through his attorney, Walter L. Gerash of Gerash, Gerash & Davis, and moves this Honorable Court to dismiss the above-numbered indictment because the Grand Jury and Petit Jury arrays systematically exclude portions of the community, thus denying the defendant a fair and impartial jury and a jury of his peers.

AS GROUNDS THEREFOR, defendant states:

1. He is presently 28 years of age.
2. On information and belief, the master lists for the grand and petit juries in question are formulated from the voter registration lists of the State of Colorado, and said lists exclude in disproportionate numbers persons with Spanish surnames, students and blacks, thus violating 28 U.S.C. § 1962 and the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.
3. On information and belief, the class of persons who actually served on the Grand Jury in question and will serve on the petit jury systematically excluded and will exclude those persons under the age of thirty-five, with Spanish surnames, of the Negro race, and students, all in violation of 28 U.S.C. § 1862 and the defendant's

rights under the Fifth and Sixth Amendments to the United States Constitution.

4. That 28 U.S.C. § 1865 (b) (1) citing the qualification that prospective jurors must reside within the judicial district within a period of one year violates the due process clause of the Fifth Amendment of the Constitution of the United States of America.

WHEREFORE, defendant prays this Honorable Court to dismiss the above-numbered indictment for the above-stated reasons, or, in the alternative, to afford the defendant an evidentiary hearing at which time the defendant will present proof of non-compliance with 28 U.S.C. § 1861 et seq.

GERASH, GERASH & DAVIS
Suite 2317, 1700 Broadway
Denver, Colorado 80202
222-8574

By /s/ Walter L. Gerash
Attorneys for Defendant
John E. Test

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 72-CR-352

[Caption Omitted in Printing]

DEFENDANT'S MOTION TO INSPECT, COPY AND REPRODUCE THE MASTER JURY WHEEL AND QUALIFIED JURY WHEEL

Filed January 2, 1973

COMES NOW the above-named defendant, by and through his attorney, Walter L. Gerash of Gerash, Gerash & Davis, and moves this Honorable Court to enter an order allowing him to inspect, copy and/or reproduce the Master Jury Wheel and the Qualified Jury Wheel of the District Court pertaining to the Grand and Petit Juries in the instant indictment.

AS GROUNDS THEREFOR, defendant states:

1. It is necessary to inspect such lists in order to present evidence at a hearing in conjunction with movant's Motion to Dismiss Indictment Because of Denial of a Fair and Impartial Jury, filed herein.

2. The opportunity to inspect and copy such lists is provided in the Jury Selection Act, 28 U.S.C. § 1867(d), and is necessary to the vindication of defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

3. A sworn statement concerning non-compliance with 28 U.S.C. § 1961 et seq. is attached to this motion as "Exhibit A."

WHEREFORE, defendant prays this Honorable Court to enter an order permitting him to inspect, reproduce and copy the records or papers used by the Clerk of the District Court in connection with the selection process of the Master Jury Wheels and the Qualified Jury

Wheels of the Grand and Petit Juries in the instant case.

GERASH, GERASH & DAVIS
Suite 2317, 1700 Broadway
Denver, Colorado 80202
222-8574

By /s/ Walter L. Gerash
Attorneys for Defendant
John E. Test

DEFENDANT'S EXHIBIT "A"

Filed January 2, 1973

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

WALTER L. GERASH, being first duly sworn upon oath, deposes and says:

On November 8, 1972, in the District Court in and for the County of Boulder, State of Colorado, in the case entitled *People of the State of Colorado* v. *Florencio J. Granado*, Criminal Action No. 5738, an all-day hearing was conducted. This hearing was based on a motion to quash the petit jury panel on the grounds that the voter registration lists plan of selecting jurors systematically excludes persons with Spanish surnames, youths under 30, students and workers. Prior to the hearing the District Attorney confessed the inspection of the qualified jury list.

At the hearing witness Marcela Trujillo, an expert in romance languages, identified a certain amount of Spanish surnames from the 8,000 qualified jury list. She testified that from the 8,000 there were 150 with Spanish surnames.

The 1970 U. S. Bureau of the Census figures disclosed that Chicanos 18 and over represent 5.42 percent of the total population of people in the age group in Boulder County. Those 21 and older made up 5.34 percent of the total population.

Then witness George Bardwell, a mathematician from the University of Denver, testified that the percentage of Chicanos on the jury list of 8,000 was 1.92 percent. Professor Bardwell said that the probability of 1.92 percent occurring by chance was as unlikely as getting six straight royal flush hands in poker. The mathematician further testified that people 18 to 30 years of age represented 41.30 percent of the general population of Boulder County while those people 20 to 30 years of age con-

stituted 31.7 percent, according to the United States Census. However, the number of people in the 20 to 30 age group represented only 17.5 percent of the jury list. If jury members were truly selected at random, Professor Bardwell testified, that one can reasonably expect figures of 36.9 and 45.3 percent between 18 and 30.

These scientific findings have statistically exposed the voter registration lists as being unrepresentative of the defendant's peers. This is the voter registration list system used by the present plan of the United States District Court for the District of Colorado. There is probable cause to believe that there is the same systematic exclusion in the United States District Court and a hearing should forthwith be held after the qualified list is given to defendant's attorney for inspection so that a full fair hearing can be held.

The presiding judge also felt that there is systematic exclusion but denied the relief because the Supreme Court of Colorado stated that the voter registration list system should continue a hear and refused to give full force and effect the existing legislation that called for supplementing the voter registration lists with other lists by March of 1972.

/s/ Walter L. Gerash
WALTER L. GERASH

[Jurat and Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

72-CR-352

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN E. TEST, DEFENDANT

EXCERPT OF TRANSCRIPT OF HEARING ON MOTIONS

Filed June 7, 1973

Proceedings before the HONORABLE ALFRED A. ARRAJ, Chief Judge, United States District Court for the District of Colorado, beginning at 8:30 a.m., on the 23rd day of January, 1973, in Courtroom A, United States Courthouse, Denver, Colodaro.

APPEARANCES:

J. TERRY WIGGINS, Assistant United States Attorney for the District of Colorado appearing for the Plaintiff.

WALTER GERASH, Attorney at Law, Denver, Colorado, appearing for the Defendant.

[2] PROCEEDINGS

THE COURT: 72-CR-352, United States versus John Test. Mr. Wiggins for the government and Mr. Gerash for the defendant. The matter is before the Court on several motions filed by the defendant. I shall go through the motions myself and see what we need if anything in the way of argument.

* * * *

[8] Now, the only other two motions deal with the jury selection process, and we have been through this several times, Mr. Gerash.

MR. GERASH: Except I have a new wrinkle, Your Honor.

THE COURT: All right. On the old wrinkles, there is the same ruling.

MR. GERASH: Well, the Court is going to be very surprised.

THE COURT: All right.

MR. GERASH: I had an opportunity to raise this issue at the Tenth Circuit Court of Appeals, but unfortunately, the Tenth Circuit reversed it on a different ground, so I have never gotten to the Tenth Circuit on this issue. However, the Court will please note that my affidavit that I attached to my motion to inspect pursuant to 28 USC 1867(d), which in my opinion makes it mandatory for the Court to allow us to inspect and says "shall," but there is required an affidavit.

Now, basically, without my rereading my affidavit, I tried a case before Judge Scott, entitled People versus Florencio Granada. Granada was charged with assaulting a [9] police officer with his own pistol, and I had a one-day hearing before Judge Scott. Boulder uses the voter registration lists or they did at that time, and they have not been supplemented by the Supreme Court as they should have been in January of 1972.

The Supreme Court pursuant to the statute at that time—it says that the Supreme Court or the court shall supplement these lists by various other methods like—

THE COURT: You are talking about the state law.

MR. GERASH: Right.

THE COURT: All right.

MR. GERASH: But the reason that it is appropriate here is that Bolder County uses the voter registration lists, which the federal plan uses here. So, what happened, here's what we did.

First, we went to the population census, in 1970 and we found out that in Boulder County as to Chicanos, Spanish surnamed people, there were about 5.42 percent total population, and those 21 and older were 5.34 percent of the total population, U. S. Census.

Then we went to the 8,000 qualified list, of the qualified list, that is after throwing off people who had felonies and people who are elderly and so forth. We find only 1.92 percent of Spanish surnamed, and the mathematician, George Bardwell, from the University of Denver and University [10] of Colorado, where he taught also, stated that the probabilities of this disparity occurring by chance was as unlikely as getting six straight royal flush hands in poker. In other words, the probability of that happening is ten to the 38th power, so, therefore, there is a high probability that this federal plan that uses the voter registration lists apropos to Spanish surnames, that these persons will be woefully inadequately represented.

Now, in Peters versus Kiff, this Supreme Court—now, we are not talking about the Warren Court or the Holmes Court, but this court, this Supreme Court—in Peters versus Kiff stated that my client does not have to be one of the minority group excluded. He can be Anglo, White, but he is entitled to a cross-section of the community, so we have standing.

Now, also Professor Bardwell in analyzing the statistics as to age, also found that people 18 to 30 represented 41.3 percent of the general population of Boulder, and that 20 to 30 constituted 31.8. However, when he looked at the qualified list based on the voter registration system, only 17.5 of the youth were represented, so they were under-represented at least 40 percent, and this being a drug offense and utilization of drugs being an epidemic in the high schools and in the communities, we feel the jurors from 18 to 30 would have a more sympathetic attitude toward the defendant in this case, so it is a very real thing, very real thing.

[11] Professor Bardwell stated that the voter registration list absolutely excludes so much that in that case it was three straight royal flushes in a row that young people from 20 to 30 would be under-represented.

So I have before the Court my affidavit that shows probable cause for this Court to be suspicious enough for me to analyze the jury, the qualified list, so I can show this Court by scientific evidence that Chicanos, Spanish surnamed people and young people are systematically excluded by the voter registration system.

Now, this Court and Judge Winner, and I believe it was Judge Chilson—

THE COURT: Doyle.

MR. GERASH: Yes, Doyle, and Judge Chilson. In fact, Judge Chilson in the Cordova case, which we eventually won in the Tenth Circuit on a different ground, but in that case I made the argument to him and he said and you said to me, "Well, how can we supplement? How can we change it?" Well, I am ready to tell the Court that.

THE COURT: All right, tell me.

MR. GERASH: All right, I am ready to tell the Court that this federal government has the income tax returns of almost all persons who work in this country, and I think they can easily give us the income tax return and we can choose from the income tax returns. They are all IBM. We can get [12] the names. We can go to the University of Boulder. They can go to the U. S. Census. It is all patterned, and if we can't get them, we can supplement them with the University of Colorado, University of Denver, Metro State College. We can get the young people. We can go to the people who drive cars now even, young people. We can go to the registration at the motor vehicle bureau. They have them all on IBM systems. We can use the city directories. In fact, my old affidavit said that Mr. Erickson stated that any system that uses the voter registration list systematically excluded at least half of the young people and minority people and he gave the reasons, but this is an actual court hearing.

Judge Scott thinks I am right, and the reason he didn't grant me my relief, and unfortunately I won the case or else it would be in the Supreme Court, and it seems like I can never get a high body to review it, but I will, but anyhow, Judge Scott said that, "You made your case, but since the Supreme Court postponed the utilization of the supplementing of the list until '73, what am I going to do? They said they would do that and it seems to me they would not overrule themselves."

So I never had it resolved, but what I am trying to say is my affidavit before the Court, and I am on all four

squares, I have presented to this Court my affidavit. My affidavit has tested the voter registration system and has [13] found it horribly wanting by scientific evidence, Your Honor. All I ask is the same thing to—all I want is the qualified list.

THE COURT: How can you tell that a person is black?

MR. GERASH: I am not talking about blacks.

THE COURT: Just Chicanos?

MR. GERASH: Absolutely, because the government does it by the Spanish surname system of analysis and I can tell with language experts like I did in Boulder which ones are Spanish surnamed and which ones are not and I can tell it absolutely and I can tell the age because the ages are given by the jurors in their applications and I can tell when young people have been systematically excluded.

THE COURT: We know that so far in our jury selection there have been no jurors between the ages of 18 and 21. I am putting that on the record. There will be starting this year, because we got the new registration lists from '72. That's the last one, and the young people that registered will be a part of the overall reservoir.

MR. GERASH: That will be fine.

THE COURT: Of names, so they are going to be in.

MR. GERASH: That will be better.

THE COURT: It is not going to help you. I concede to you, Mr. Gerash, that there are not—the percentage of Chicanos selected for jury service under the system that we [14 utilize is less than the proportion of population of the Chicano people in any given county—I wouldn't say in any given county, but in most, so we concede that. We are starting with that, so what you are looking at, the master jury wheel will prove. It will prove what we concede, so the record shows that.

MR. GERASH: But, Your Honor, what I want to show is that it is not a miniscule amount. It is a very substantial amount, and since this Court has the power or had the power since 1968 to supplement the list, to supplement the list—

THE COURT: We cannot get your income tax, a copy of your income tax return, Mr. Gerash. There is no way that I know of that our court can get that unless it is involved in a litigation, but we can't write to the Treasury and say, "Furnish a copy of all the income tax lists," and also that's a ridiculous suggestion in my opinion because then you come back and say that the blacks and Chicanos are the low-income people. They don't earn enough to file a tax return, therefore you are not getting them.

MR. GERASH: The poor people pay most of the taxes in this country.

THE COURT: Well, not income taxes. They may pay sales taxes, but they don't pay most of the income taxes.

MR. GERASH: Another thing I would like to point out, the further invidiousness of the voter registration system [15] is this, if you don't vote in the election, either gubernatorial, congressional or presidential election, you are purged from the list and we found that over —almost as high as 25 to 30 percent of the people have been purged from the lists.

THE COURT: Now, wait, you are not—we do not have the list after the election. We get the list prior to election time, so we get the registered voter. Whether he votes or not, he is in this, if he was registered.

MR. GERASH: But, but I mean the new list, though, he is automatically purged from the voter registration list.

THE COURT: But he can reregister.

MR. GERASH: Right, but if he doesn't, in other words, if he is disenchanted with the electoral process, it says therefore he can't be a juror. I don't think that necessarily follows. He is a member of the community and pays his taxes, and I have some statistics on that, but what I am trying to say is certainly that in the 1970 election in fact, which was an election where a lot of people didn't vote, those persons have been purged.

Now, I do not know if you are still operating from the '68 list or the '70 election, but if you are operating under the '70 election, those who did not vote in the '70 election were purged, and if they didn't reregister they would not be on the '70 list, and if you are still operating under the '68 list, certainly, there is going to be a lot of young [16] people who were, you know, like 20, who are four years—who have to be 25 years of age, so automatically you are going to lose people from 21 through 25.

What I am trying to say, Your Honor, is that I have established probable cause through my affidavit that I would like to look at and make a record to at least have a hearing. I want to put my foot in the door to have a hearing. The Courts have united for whatever reason, but I think if I can amass a statistical analysis and convince this Court, and I think my client is entitled to a fair hearing, because we are under the grand jury system, and if I can show that the composition of the grand jury is woefully inadequate to deny my client a consideration of his peers, then the indictment is no good, and in fact I am not unique, Your Honor.

I have in my hand United States versus Gray, Molino, Thomas, Queros and Queros, Criminal Action No. 72-279, in the District Court for the Western District of Oklahoma, and several professors representing the Indians, native Americans, who were arrested for possessing stolen goods from Washington, D.C., when there was a sit-in at the Bureau of Indian Affairs, and they have raised these same issues, perhaps a little more uniquely specific to their jurisdiction. I painted a broader picture. I haven't gotten down to some of the unique problems, but just one problem that is raised is this, the Supreme Court of the United States [17] says that you can't exclude a person from voting because he has a small residency. The act says you have to live in the jurisdiction for one year. In other words, this jury selection act, that part of it that states that he must live in the jurisdiction for one year, is unconstitutional because the Supreme Court said that you can vote if you reside thirty days in—

THE COURT: Well, if our jury act is unconstitutional, you have no problems. Your motions are denied. You can get it reversed on the grounds—

MR. GERASH: Well, that's later, but I want to look at the qualified jury list in order to have a hearing. In other words, I want a hearing.

THE COURT: You are not going to have a hearing in this case. If you want to look at the jury list some time, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that.

MR. GERASH: All right.

THE COURT: That's on the record.

MR. GERASH: My position is, though, if I can show it is so overwhelming, it is a violation of due process, and I [18] can't do it. I have nothing to go up to the Tenth Circuit on if I lose this case to show that it is substantial.

THE COURT: Well, it is denied and we would welcome you to put in writing your suggestions as to how the jury plan that's in existence, and you have a copy of it, you have been furnished a copy—if you will put them in writing, we will explore them. We are searching, frankly, for ways to supplement our list, and for your information I have compiled and I have in my hand here the population from the 1970 census in each county in each jurisdiction in the State of Colorado, and I also have the number of Spanish surnamed people in each county, and I also have the number of blacks in each county in excess of 500. The census doesn't have it below that, and I paid for the book myself to get this information.

MR. GERASH: Your Honor, for your edification I think and help, and also for the record, the American Criminal Law Review, Volume 10, No. 4, Summer of 1972, put out by the ABA, American Bar Association—that's in a symposium on the grand jury—this is summer, '72—the American Criminal Law Review has a fantastic article on jury selection, mathematical method, on Page 771, "Jury Selection, Mathematical Method," by David Kairys, and in his analysis he gives a little background, and what is very fascinating is that he states

this at Page 797. He says, "The source, Voter Registration List. No source may be used which is discriminatory against a [19] cognizable group. Most courts considering the issue have held that voter registration lists are a proper source for judicial selection," citing the cases. "However, voter lists may not be used when they are actually a subterfuge for discrimination. Moreover, some courts have suggested that voter lists are per se an unconstitutional source since they are not representative of a cross-section of the community and they exclude many persons who are statutorily qualified for jury service," and they cite the cases of Pullam versus Green, 396 F 2d 251, at 255, a Fifth Circuit case of 1968.

THE COURT: Well, I am familiar with those cases. I have your citations.

MR. GERASH: But, however, they also cite a United States Department of Commerce, Bureau of Census, Population Characteristics, Voting and Registration in the Election of November, 1968, Series P-20, Number 192, 1969, and there they cited a detailed federal report which compares the characteristics of registered voters with the characteristics of the whole population, factually supporting the conclusion that voter lists are discriminatory. This is the United States Government figures, U. S. Department of Commerce, and also it says the report also disclosed that those of lower incomes, educational and job level, as well as those under 35 years of age, were under-represented and this is precisely what my figures showed before Judge Scott in the Boulder case of People [20] versus Granada, and it is not just a theoretical quibbling that youth and Spanish surnames are under represented. It is substantial and it goes to the vitiating of a fair trial.

THE COURT: All right, Court is in recess.

(Whereupon, at 9:10 o'clock a.m., the proceedings were concluded.)

* * * *

[Reporter's Certificate Omitted in Printing]

MINUTE ORDER OF THE DISTRICT COURT,

JANUARY 24, 1973

Filed January 24, 1973

[Caption Omitted in Printing]

* * * *

Motion to Inspect, Copy, and Reproduce the Master Jury Wheel and Qualified Jury Wheel

Ordered: Arrangements could be made for defendant through attorney Walter L. Gerash to do so, but denied as to an issue in this case.

Chief Judge Alfred A. Arraj
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1973

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(District Court No. 72-CR-352)

Filed November 1, 1973

James L. Treece, United States Attorney, and J. Terry Wiggins, Assistant United States Attorney, Denver, Colorado, for Appellee

Louis M. Fischer, Denver, Colorado and Walter L. Gerash, Denver, Colorado, for Appellant

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Before CLARK,* Associate Justice; SETH and McWILLIAMS, Circuit Judges.

PER CURIAM:

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* Associate Justice, United States Supreme Court, Retired, sitting by designation.

Appellant John E. Test stands convicted by a jury on a one count indictment charging him with knowingly and intentionally distributing a controlled substance, to wit: Lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 841.[1] On his appeal Test presents several questions but only two have substance, i.e., (1) Was Test entrapped as a matter of law and (2) Did he have the specific intent required by the statute. We have concluded that neither point has merit and, therefore, affirm the conviction.

1. *Facts and Circumstances*:

John Test first met Peter Brophy, the Government informer, in October, 1971, as a customer at Brophy's fish market, Seafood Limited, located in the Happy Canyon Shopping Center in Denver, Colorado. During the next several months Test and Brophy developed a friendship. Test performed odd jobs at Seafood Limited and he and Brophy drank beer together occasionally; Test was invited to Brophy's home and met his wife. It appears that at various unspecified times Brophy told Test that he had prior dealings in smuggling marijuana from Mexico to California, that he was a pilot and had used a plane to bring the contraband into the United States, and that he had invested his illegal profits in Seafood, Limited. None of Brophy's accounts of his trafficking in illicit drugs was true.

By February 24, 1972, the relationship having continued, Brophy told Test that he would like to have a few tablets to give some friends; and Test obligingly produced seven tablets in a tinfoil packet which he said were "probably mescaline and acid." Brophy turned the tablets over to Agents Ercole and Lochridge of the Bureau of Narcotics and Dangerous Drugs; and a laboratory test revealed that they were LSD cut by a large amount of stearic acid. Test denied giving the tablets to Brophy. On March 13, 1972 Brophy called Agent Allen of the Bureau and arranged for Allen to come to Seafood Limited to meet Test. Neither Brophy nor Test had met Allen previously. Allen posed as Tom Stone, a ski instructor at Aspen and former associate of Brophy in the drug traffic in California. Allen testified that he told Test that he wanted to buy some cocaine and that Test told him "he had a connection for cocaine who could sell pound quantities . . ." quoting a price of $11,000 per pound. They discussed the purchase of approximately two to five pounds. In addition Test said he "could supply . . . marijuana, hashish, LSD and amphetamines." No sale or distribution was made at this meeting.

A second meeting between Agent Allen and Test occurred on March 15, 1972. While Brophy's part in the meeting is somewhat hazy, it appears that he overheard "a lot of the talk" but was not an active participant. Test told Allen that "there would be a delay in the delivery of the cocaine" but that "he had been successful in reducing the price of cocaine from $11,000 to $10,500" and that he "had access to 40 pounds of marijuana which he would be willing to sell for $145 a pound." As to cocaine, the two discussed a purchase price of $42,000 for four pounds. Apparently both parties then endeavored to make a showing of good faith. Agent Allen displayed $15,000 in Government funds (Test claimed it was $50,000) in the trunk of his car. Test gave Allen a marijuana cigarette saying that he hoped he enjoyed smoking it. When it became apparent, however, that Test could not produce any cocaine, Allen said: "I have to show my people something" and asked Test "if he could get any other substances." Test replied "that he might be able to get him some mescaline."

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[1] 21 U.S.C. § 841 provides in pertinent part:

"(a) Unlawful acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance".

21 U.S.C. § 812 specifies that Lysergic acid diethylamide is a Schedule I controlled substance.

Subsequently, on March 27, 1972, Brophy contacted Agent Allen to set up a meeting for the purchase of 2,000 tablets of what was alleged to be mescaline. Allen met Test the next day at Seafood Limited. The sale was made inside a Government car parked in the shopping center parking lot. Allen paid Test $450 and received approximately 1000 tablets in a plastic bag. Test told Allen that the tablets "were stamped out by his friends" and that "he could get 50,000 tablets more." He testified that he had purchased the tablets two days earlier from two friends in Pine, Colorado paying $400 for them and leaving him a $50 profit on the deal.

Agent Allen testified that when he purchased the tablets, he believed them to be LSD. "Most of the drugs," he said, "that we have encountered that have been referred to us, chocolate mescaline as they were called, in fact turned out to be LSD." Subsequent laboratory analysis of the actual 1,018 brown tablets received by Agent Allen disclosed that they contained LSD cut by phencyclidine (PCP). The Government's expert witness, Mr. Ruybal, a forensic chemist with the Bureau of Narcotics and Dangerous Drugs, testified at the trial that he had analyzed more than five hundred separate samples of drugs denoted as mescaline but that they normally did not contain mescaline but were usually LSD by itself, PCP by itself, or LSD cut by PCP. He stated that PCP was a normal cutting agent for LSD.

2. *Entrapment*:

Test asserts that he was unquestionably entrapped as a matter of law and should, therefore, have been acquitted. His claim is based on Brophy's alleged exploitation of their friendship to set him up for the drug deal with Agent Allen, Brophy's false stories of his prior drug exploits, his introduction of Agent Allen under false pretenses, Agent Allen's repeated requests for the production of drugs, and his showing of a large sum of money despite the fact that Brophy and Allen knew Test had no prior criminal record but kept after him on the theory that he might have known some large drug traffickers.

Entrapment is a "relatively limited defense." *United States* v. *Russell*, 411 U.S. 423 (1973). Entrapment as a matter of law is the more limited in terms of its availability. It is rudimentary that entrapment as a matter of law can only be found where it appears unmistakably clear to the trial judge that undisputed evidence establishes that the criminal design originated with Government agents, was the product of their creative activity and was implanted in the mind of an otherwise innocent person totally lacking the requisite predisposition to commit the crime. *Sorrells* v. *United States*, 287 U.S. 435 (1932), *Sherman* v. *United States*, 356 U.S. 369 (1958).

In *Sorrells*, *supra*, the Supreme Court stated that when a defendant claims entrapment:

> "The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." 287 U.S. at 451, 452.

In line with this concept, this court has exhaustively scrutinized the record examining the conduct of informer Brophy, of Special Agent Allen as well as the conduct and predisposition of Test. Construing the evidence in the light most favorable to the Government, as we are required to do, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we are not persuaded that the conduct of the Government's agent and informer was so improper, overzealous or otherwise offensive as to amount to entrapment as a matter of law. As the Supreme Court said in *United States* v. *Russell*, *supra*: "*Sorrells* and *Sherman* both recognize 'that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution,' 287 U.S., at 441; 356 U.S., at

372. Nor will the mere fact of deceit defeat a prosecution, see, *e.g.*, *Lewis* v. *United States*, 385 U.S. 206, 208-209 (1966), for there are circumstances when the use of deceit is the only practicable law enforcement technique available." At 435-436.

Here, Test contends he was tricked and enticed by his friend Brophy—their friendship exploited. There is no evidence in the record which conclusively establishes that Brophy was a paid Government informer when he first met Test. Nevertheless it is true that Test's friendship with Brophy had a bearing of Test's delivery of the seven tablets on February 24, 1972. However, Test was not indicted or convicted for this distribution. Brophy did utilize his friendship with Test to introduce him to Agent Allen but thereafter played a decidedly unobtrusive role in the course of events leading up to Test's transaction with Agent Allen on March 28th. Neither this mere introduction nor his actions as a go-between for Allen and Test in arranging their meeting rises to the level of entrapment as a matter of law. Nor can Test successfully argue that his friendship with Brophy had such a compelling spillover effect on him *vis-a-vis* his relationship with Agent Allen that he was rendered powerless to distinguish between right and wrong or to refuse to cooperate with Agent Allen. Allen's requests for the production of drugs are a judicially acceptable tactic especially since the solicitations involved here were met with very little, if any, firm reluctance on Test's part. Furthermore, there is no evidence that Allen threatened, cajoled or browbeat Test. Indeed, Test volunteered extensive information about his drug connections, what types and quantities of drugs were available and presented Allen with various options and alternatives. Nor was Agent Allen's display of cash a fatal flaw in the case when viewed in the context of the negotiations at that point. It was merely a showing of good faith. Test's *quid pro quo* was the gift of a marijuana cigarette. Finally, all the evidence concerning Test's continuous pattern of illicit drug activities and his state of mind as revealed by his highly significant admissions at the trial is convincing proof that he was

no cats-paw for Brophy but was in reality a drug trafficker. He fails to qualify as the "unwary innocent" victimized by a pernicious criminal scheme wholly manufactured by law enforcement officers. *Sherman* v. *United States*, *supra*, at 372. His lack of a prior criminal record, contrary to his claim, is not exculpatory.

Although the trial judge found, and we agree, that there was no entrapment as a matter of law in this case, the Government, citing *Martinez* v. *United States*, 373 F. 2d 810 (10th Cir. 1967), contends that Test was not entitled to have the entrapment issue submitted to the jury because he plead not guilty to the offense charged. Whether or not this be so as a general rule,[2] a matter we do not reach, it is clear that the Government's case here was in no wise prejudiced by the submission because the jury found with the Government.

3. *Specific Intent*:

Test's second line of defense is that he lacked the specific intent required by the statute to commit the offense for which he was convicted. He claims a judgment of acquittal should have been entered on the grounds that he did not knowingly and intentionally distribute LSD, "although he may have had the intent to distribute mescaline." At the trial Test testified that he told Agent Allen that he "might be able to get him some mescaline," that subsequently he "purchased the mescaline" for $400, that he sampled the tablets to be sure they were not LSD, and that he dispensed over one thousand tablets to Agent Allen on March 28, 1972, two days after he purchased them, for $450. He stated he knew LSD was illegal but "wasn't sure" about mescaline.

Unquestionably it is the province of the jury to pass upon guilt or innocence. *Sinclair* v. *United States*, 279 U.S. 749, 765 (1929). Where, as here, an essential element of the offense charged is the specific intent to commit it, the issue of intent is to be submitted to the jury. *Screws* v. *United States*, 325 U.S. 91, 106-107 (1945).

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[2] See, *Sorrells* v. *United States*, 287 U.S. at 439, 451-452.

Whether or not Test new the character of the substance he was distributing or that his distribution was an illegal act is not for this court to say. It is the jury's function and duty to weigh the conflicting evidence and draw reasonable inferences therefrom in making its judgment. And any claimed ignorance of the law on Test's part is no excuse. *United States* v. *International Minerals & Chemical Corporation*, 402 U.S. 558 (1971).

We believe that was substantial credible evidence before the jury, both direct and demonstrative, from which it could justly reach its verdict, and we are bound to sustain it. *Glasser* v. *United States*, *supra*, at 80. To hold otherwise would precipitate a headon collision with the Seventh Amendment. U.S. CONST. amend. VII, *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd., et al.*, 369 U.S. 355 (1962).

We have closely examined appellant's other contentions and find no merit in them. Accordingly, the judgment of conviction is affirmed.

Affirmed

SEPTEMBER TERM—NOVEMBER 1, 1973

Before Honorable Thomas C. Clark, Associate Justice*, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

This case come on to be heard on the record on appeal from the United States District Court for the District of Colorado and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that John E. Test, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

Howard K. Phillips,
Clerk

/s/ Leon M. Islbeck
Deputy Clerk

Before Honorable Thomas C. Clark, Associate Justice*, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

(* Of the Supreme Court of the United States, Retired.)

No. 73-1337

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOHN E. TEST, DEFENDANT-APPELLANT

(November 26, 1973)

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips,
HOWARD K. PHILLIPS,
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-5993

JOHN E. TEST, PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 1 presented by the petition which reads as follows:

> "1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. § 1867(d) in support of a motion to quash the jury and upon the presentation of a prima facie claim of constitutional dimension, i.e., the systematic exclusion of Mexican-Americans from the jury array?"

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SUPREME COURT, U.S.

No. 73-5993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

ORIGINAL COPY

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of the knowing and intentional distribution of lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). He was sentenced to eighteen months' imprisonment (Pet. 3). The court of appeals affirmed on November 1, 1973 (Pet. App. B). The petition for rehearing was denied on November 26, 1973 (Pet. 2). The petition for a writ of certiorari was not filed until December 27, 1973,[1/] and is therefore out of time under Rule 22(2) of the Rules of this Court.

In October 1971 petitioner met one Peter Brophy at Brophy's fish market and became friendly with him (Tr. 77, Vol. I). Petitioner thereafter began doing odd jobs at the market. Brophy told petitioner that he had previously been involved in trafficking in drugs (which was not true) and asked petitioner to sell him some LSD for his friends. Petitioner sold Brophy seven LSD tablets, which Brophy turned over to agents of the Bureau of Narcotics and Dangerous Drugs (I Tr. 102, 103, 112, 113, 116).

In March 1972, Brophy introduced petitioner to Special Agent Allen of the BNDD (I Tr. 32, 40, 41, 107, 108). Agent Allen and petitioner met several times to discuss drug deals involving large amounts of cocaine, marihuana and mescaline (Tr. 32-34, 58, 91-92). On March 28, 1972, petitioner sold agent Allen 1,000 LSD tablets for $450 (I Tr. 16, 35, 36).

1. Petitioner contends that the trial court committed reversible error by refusing to answer two questions from the jury. The questions and answers were (emphasis in original):

> Q. #2 Can the terms LSD and mescaline be considered as interchangeable words as far as the jury is concerned in determining a verdict on the indictment.
>
> A. I regret the court cannot answer your question.
>
> Q. #5 Can Pete Brophy be considered as working with Government as regards the "entrapment" law.
>
> A. You must rely on your memory of the court's instructions and the evidence.

With respect to the first of these questions, the trial court initially proposed to advise the jury that the terms were in fact not interchangeable, but that both LSD and mescaline were controlled substances (Tr. 50). Defense counsel objected to this answer on the ground that the court

the indictment; he asked the court to instruct only that the terms were not interchangeable (tr. 50). The trial court refused to respond to the jury in this manner, on the ground that such a response would be incomplete and misleading. Instead, the court told the jury that it could not answer the question.

Petitioner's proposed answer was based upon the theory that, if he had in fact distributed LSD while intending to distribute mescaline, he should be acquitted. Since both drugs are Schedule I controlled substances (21 U.S.C. 812(c), Schedule I(c)), and since the statute requires only the intent to distribute a controlled substance, this theory is incorrect and petitioner's proposed answer could have misled the jury. Of course, if the indictment had charged the unlawful distribution of LSD, and petitioner had in fact distributed mescaline, that would appear to be a good defense to that indictment. For that purpose the terms are not interchangeable. But petitioner did not challenge the laboratory test concluding that the substance he admittedly distributed was LSD.

The second question related to Brophy's status as a government informant. It presented an evidentiary question. The court, in its discretion, properly instructed the jury to rely on its reconstruction of the evidence and the instructions rather than giving an answer that would have unduly emphasized one aspect of the entrapment defense.

2. Petitioner's contention that a mistrial should [illegible]

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United States Attorney in his closing argument is without merit. After the first comment,[2/] the substance of which was a response to defense counsel's appeal for sympathy for a first offender, the court properly sustained petitioner's objection and gave the jury a cautionary instruction (Tr. 31, Sup. Vol. I). This was the correct procedure, and it sufficiently cured any confusion that the comment may have generated. See United States v. Ramsey, 459 F.2d 431, 436 (C.A. 7); United States v. Burston, 453 F.2d 605, 611 (C.A. 5), certiorari denied, 409 U.S. 843; United States v. Hailo, 443 F.2d 1295, 1300 (C.A. 9).

Petitioner made no objection to the second comment that he now challenges[3/] (Tr. 33, Sup. Vol. I). Consequently,

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2/ "We're not arguing that he has never committed these crimes before. What Mr. Gorash is telling you is that he has never been caught before, so set him free on the first time he is caught. And, of course, he will argue that to the next jury, if there is another jury. Well, Mr. Test has never been caught before, so you should set him free again. Right. Because if nothing happens here, if he were not convicted here, it's as if he's never been caught before. Do we let the person, the murdered, kill one for free? Do we let the hijacker steal one airplane for nothing because --

MR. GORASH: Your Honor, we are not trying a murder or hijacking.

THE COURT: Yes, Mr. Gorash, your objection is well taken.

MR. WIGGINS: -- because a person --

THE COURT: Ladies and gentlemen, we are not trying either a murder case or a hijack case, or anything else here. We are trying the single charge in a one count indictment. Tr. 31, Sup. Vol. I.

3/ "[I]f you [the jury] find [petitioner] guilty, it will be because you have disbelieved the testimony of all of the witnesses who have testified in his behalf, and you have believed only that of the witnesses who have testified against him." Tr. 33, Sup. Vol. I.

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petitioner's [illegible] the [illegible], if the comment amounted to plain error. Rule 52(b), Fed. R. Crim. P.; Harris v. United States, 402 F.2d 656, 657 (C.A. D.C.). Here, there was no plain error. A United States Attorney may comment on the credibility of a defendant who takes the stand. United States v. Jackson, 475 F.2d 312, 317 (C.A. 7). Moreover, even if the prosecutor's characterization of certain of petitioner's testimony as "lies" is deemed ill-considered commentary upon the defendant's credibility, such commentary here did not so prejudice petitioner as to deprive him of a fair trial. See United States v. Porter, 432 F.2d 548, 549 (C.A. 9), certiorari denied, 400 U.S. 928.

3. Following his indictment, petitioner filed a motion pursuant to 28 U.S.C. 1867 to dismiss the indictment because of the denial of a fair and impartial jury. He claimed exclusion of persons under age 35, persons with Spanish surnames, members of the Negro race and students, all in alleged violation of 28 U.S.C. 1862. Petitioner asked for an evidentiary hearing at which to prove this claim. Petitioner at the same time filed a motion seeking inspection and reproduction of the master jury wheel list and the qualified jury wheel list of the district court. Along with these motions, petitioner's counsel attached an affidavit in which he summarized the results of a hearing held in a state case involving a similar claim.

Although the petition refers to systematic exclusion [illegible]

[illegible]

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it relied solely on voter registration lists as the source of names of potential jurors. Petitioner does not allege that the voter lists were discriminatorily compiled; nor does he allege that a discriminatory selection process was used in choosing qualified jurors. Petitioner simply contends that the use of voter registration lists results in sufficient underrepresentation[4/] of certain groups, primarily persons with Spanish surnames, to invalidate the jury selection plan.

Petitioner complied with the provisions of 28 U.S.C. 1867, which prescribes procedures for challenging a jury selection plan, by filing a timely motion, accompanied by a sworn statement. As noted earlier, petitioner also moved to inspect the jury lists, i.e., the master and qualified wheels. In denying petitioner's motion, the district court assumed that the use of voter lists resulted in some degree of underrepresentation of blacks and persons with Spanish surnames (Court of Appeals Record, Supp. Vol. II, pp. 13-14). The court, apparently believing that its concession of underrepresentation made inspection of the lists unnecessary, denied the motion to inspect with the following comment:

> "If you want to look at the jury list service, we will have some other help and you come down and you can look at it all you want to, but it's not going to be used in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that." (Id. at 17).

4/ Underrepresentation refers to the disparity between the percentage of members of a cognizable class (e.g., blacks) on the jury list and the percentage of members of the class in the relevant population.

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In our view, the district court erred in denying petitioner's motion for the jury lists. 28 U.S.C. 1867(f) expressly provides that parties "shall be allowed to inspect, reproduce, and copy" such lists in the preparation or pendency of a motion challenging the jury selection plan. See, e.g., United States v. Gray, 435 F.2d 1376 (C.A. 9); United States v. Tijerina, 412 F.2d 175, 181 n. 5 (C.A. 10); see also Hobley v. United States, 373 F.2d 760 (C.A. 5).

The effect of the district court's error for purposes of disposition by this Court must be determined by a consideration of the policies of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq., with particular reference to Congress' intentions as to implementation of those policies. The Act reflects two fundamental policies concerning jury selection: Section 1861 declares that juries are to be "selected at random from a fair cross section of the community * * *," and Section 1862 declares that no citizen shall be excluded from jury service "* * * on account of race, color, religion, sex, national origin, or economic status."

Both the language and the legislative history of the Act demonstrate that Congress deemed the use of voter lists as the source, and random selection as the means, of jury selection as most likely to achieve the "cross section of the community" goal. See 28 U.S.C. 1863; H. Rep. No. 1076, 90th Cong., 2d Sess., 1968 U.S. Code, Cong. & Adm. News, p. 1792. [illegible] implementation of this fundamental goal of Section 1861 [illegible]

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affirmative obligations in certain cases beyond simply negating barriers of discrimination.

Opinions of the Courts of Appeals for the Ninth and Second Circuits have, however, suggested a more restrictive approach. Those courts have held, in effect, that voter lists are *per se* valid unless there is a showing that the groups alleged to be underrepresented were the subject of electoral discrimination within the district where the jury selection plan is at issue. See, *e.g.*, *United States* v. *Guzman*, 468 F.2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937; *United States* v. *James*, 453 F.2d 27 (C.A. 9); *United States* v. *Bennett*, 445 F.2d 638 (C.A. 9), certiorari denied, 404 U.S. 1023; *United States* v. *Parker*, 428 F.2d 488 (C.A. 9), certiorari denied, 400 U.S. 910.

The above decisions are based on the premise that a defendant must establish systematic exclusion of a cognizable class in order successfully to challenge a jury selection plan.[5/] In effect, the Ninth and Second Circuits have adopted the standards of this Court's Sixth Amendment opinions (*e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545; *Hernandez* v. *Texas*, 347 U.S. 475) as controlling under the Jury Selection and Service Act of 1968. If this view is correct, then the failure to allow inspection of the lists was not a material error in the absence of an initial allegation or showing by petitioner of past or

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5/ This premise is explicit in the Ninth Circuit decisions, and, although not expressly referred to in *United States* v. *Guzman*, *supra*, it is a necessary underpinning of that decision. [illegible]

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[illegible] to vote. If participation in federal [illegible], which he has not done. We believe, however, that the Act establishes rights broader in scope than those providing under fifth amendment principles, so that substantial underrepresentation of cognizable groups (which would include blacks and Mexican-Americans) may necessitate resort to supplementary sources under Section 1863 even though no history of voter discrimination against those groups is proved.

Our construction of the Act is derived from our view of the significance of the "cross sectional" goal of Section 1861. In short, we submit that when Congress required that juries be selected from a "cross section of the community," it intended that federal jury selection plans be affirmatively formulated to achieve that goal and not merely to avoid discriminatory practices.[6/] While Section 1863 provides for use of voter lists, it also contemplates resort to supplementary sources where necessary to foster the policies of Sections 1861 and 1862. Although in providing for supplemental sources of jurors Congress may have been most concerned with past practices of electoral discrimination, particularly in the South, the provision was not so limited. The House Report stated that voter lists are to be supplemented "* * * where they do not adequately reflect a cross section of the community." H. Rep. No. 1076, supra, at page 1791.

6/ This is not to say that instances of discrimination are [illegible] under the Act. For example, [illegible] of the underrepresentation of part of [illegible] is [illegible] than [illegible] in the [illegible].

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Since, on this record, it is not possible to have the d[illegible] of voter registration, by race, of various groups in Colorado's voting lists, and thus the possible deviation of Colorado federal jurors from the community cross section, we believe that petitioners are entitled to inspect the jury lists. That is not to say, however, that he is likely to prevail in his challenge to the selection plan. While voter lists inevitably appear to involve some degree of under-representation of certain groups, they remain the best "cross-sectional list of potential electors." Orfield, The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals, 20 Hastings L. Rev. 319, 321 (1969).

Whether voter lists operate as effectively in the area of racial discrimination to bring about an effective cross section of the community depends on the history of electoral discrimination and on the efficacy of remedial legislation such as the Voting Rights Act of 1965. Here, where it is not alleged that patterns of discrimination have existed in Colorado, petitioners must, in our view, demonstrate a greater degree of under-representation than would be required where there is evidence of present or effective bias. [illegible] there is no cross section, petitioners must point to a feature of the [illegible] selection of a potential juror. 2/

2/ [illegible] Cf. Swain v. Alabama, 380 U.S. 202, 208 [illegible]

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[illegible] 611 F.2d 1 (1st Cir. 1979), [illegible] 612 F.2d 611 (D.C. Cir. 1979), [illegible] 615 F.2d 1152 (7th Cir. 1980), [illegible] 616 F.2d 1 (2d Cir. 1980), [illegible] 617 F.2d 1 (5th Cir. 1980), [illegible] 618 F.2d 1 (8th Cir. 1980), [illegible] 619 F.2d 1 (9th Cir. 1980), [illegible] 620 F.2d 1 (10th Cir. 1980), [illegible] 621 F.2d 1 (11th Cir. 1980), [illegible] 622 F.2d 1 (D.C. Cir. 1980), [illegible] 623 F.2d 1 (1st Cir. 1980), [illegible] 624 F.2d 1 (2d Cir. 1980), [illegible] 625 F.2d 1 (3d Cir. 1980), [illegible] 626 F.2d 1 (4th Cir. 1980), [illegible] 627 F.2d 1 (5th Cir. 1980), [illegible] 628 F.2d 1 (6th Cir. 1980), [illegible] 629 F.2d 1 (7th Cir. 1980), [illegible] 630 F.2d 1 (8th Cir. 1980), [illegible] 631 F.2d 1 (9th Cir. 1980), [illegible] 632 F.2d 1 (10th Cir. 1980), [illegible] 633 F.2d 1 (11th Cir. 1980), [illegible] 634 F.2d 1 (D.C. 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Since [illegible] a successful [illegible], it is respectfully submitted that the petition should be denied in all other respects.

[illegible],
Solicitor General.

MAY 1974.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-5993

JOHN E. TEST, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

While Petitioner still maintains that the issues of the instruction of the jury below and the prosecutor's improper closing arguments (p. 12-20 of the Petition for Certiorari) present adequate grounds for the granting of certiorari, Petitioner would like to join in the Solicitor General's construction of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. (Memorandum for the United States, at p. 7-9.)

"[T]he Jury Selection and Service Act goes beyond prohibition of 'intentional' distortions and provides that

in certain cases affirmative measures must be undertaken to insure that 'juries [are] selected at random from a fair cross section of the community. . . .'" United States v. Fernandez, 480 F.2d 726, 733 (2d Cir. 1973) (citing 28 U.S.C. § 1863(b)(2); H.Rep. No. 1076, 1968 U.S. Code Cong. & Adm. News 1792, 1794). See also United States v. Butera, 420 F.2d 564, 568 N. 7 (1st Cir. 1970), where the First Circuit stated that it had supervisory powers "over and above" the constitutional requirements in dealing with federal juries.

Indeed, if the Congressional intent is to be fostered, the statute must be given a broad interpretation. The statutory mandate of juries "selected at random from a fair cross section of the community," 28 U.S.C. § 1861, can only be interpreted as going beyond the Sixth Amendment decisions of this Court and requiring positive, affirmative steps to achieve the policy and rights fostered by §§ 1861 and 1862. See, e.g., § 1863(b)(2), which requires supplementation of the voter registration lists when the latter "do not adequately reflect a cross section of the community." H.Rep. No. 1076, supra, at 1794. And see § 1863(b)(3), which states that the procedures utilized in selecting names for jury panels "shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes." When read together, these statutory sections and

the relevant legislative history make clear that the provisions of the statute create an affirmative burden to achieve "a fair cross section of the community," and not merely negate discrimination in selection.

For these reasons, Petitioner joins in the position of the Solicitor General and suggests that a remand be granted herein, giving Petitioner the opportunity to inspect the jury lists and attempt to prove his motion challenging the array in the district court.

Respectfully submitted,

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June , 1974

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1973

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (App. 27-34) is reported at 486 F.2d 922.

JURISDICTION

The judgment of the Court of Appeals was entered November 1, 1973. (App. 35). A timely petition for

rehearing was filed on November 14, 1973, and was denied by the Court of Appeals on November 26, 1973. (App. 36). A Petition for Writ of Certiorari was filed on December 27, 1973, and was granted June 17, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, impose an affirmative burden to comply with the policy and rights of § § 1861 and 1862 that is broader in scope than the requirements of the jury composition cases such as *Whitus v. Georgia*, 385 U.S. 545 (1967), which prohibit "purposeful discrimination" or "systematic exclusion" of cognizable groups of the community from jury venires?

2. Did Petitioner fulfill the requirements of either the Jury Selection Act, 28 U.S.C. § 1867(d), or the "systematic exclusion" cases so that he should have been granted the right of discovery of documents and questionnaires concerning the master and qualified jury wheels for the grand and petit juries involved in his prosecution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI provides in pertinent part:

> In all criminal prosecutions the accused shall enjoy

> the right to * * * trial by an impartial jury of the state and district wherein the crime shall have been committed, * * *

28 U.S.C. § § 1861-1869 (1968) [set out in the Appendix herein, at p. 1a-13a] 28 U.S.C. § 1865(b)(1) (1972) [set out in the Appendix herein, at p. 14a] 28 U.S.C. § 1869(h) (1972) [set out in the Appendix herein, at p. 14a]

STATEMENT

Petitioner was indicted on October 26, 1972, for the alleged violation of 21 U.S.C. § 841(a)(1), the knowing and intentional distribution of lysergic acid diethylamide (L.S.D.). Petitioner, through counsel, filed pre-trial motions on January 2, 1973. Among these motions was a motion to dismiss the indictment and/or quash the petit jury array because of the alleged "systematic exclusion" of persons under the age of thirty-five, the Spanish-surnamed, Negroes, and students, (App. 11-12). Also filed was a motion to inspect the records utilized in connection with the selection of the master and qualified jury wheels. (App. 13-14). Attached to this motion was a sworn statement by counsel, in attempted compliance with the requirements of 28 U.S.C. § 1867(d). This affidavit stated that in a trial in the state courts a hearing had been held on a similar claim, and the evidence showed that the Spanish-surnamed and persons between the ages of 20-30 were quite significantly underrepresented on the jury lists. Inasmuch as the state court in question had used a system of selection that was similar to that used by the U.S.

District Court for the District of Colorado, counsel stated that there was probable cause to believe that similar underrepresentations existed in the federal system. (App. 15-16).

A hearing was held on these motions in the district court on January 23, 1973. At that time, both the motion to inspect the jury records and the motion to dismiss the indictment were denied. (App. 24, 26). However, the district court conceded that blacks and persons with Spanish surnames were underrepresented. (App. 21, 24). Despite this concession, the court denied inspection of the jury records with the following comment:

> "You are not going to have a hearing in this case. If you want to look at the jury list sometime, we will hire some extra help and you come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that." (App. 24).

Petitioner was convicted following a trial to a jury of twelve, and he was sentenced to a term of imprisonment of one and one-half years. The Court of Appeals for the Tenth Circuit affirmed his judgment of conviction. The Court of Appeals did not directly rule on the issues involved herein; rather, the opinion merely states that such issues were among those without merit. (App. 34).

SUMMARY OF ARGUMENT

1. The Jury Selection and Service Act of 1968 sets forth two major policies: (a) the jury should be a representative cross section of the community, and (b) each qualified person should have an equal opportunity to be considered for service, 28 U.S.C. § 1861. The Act utilizes two primary methods to achieve these policies. The first is random selection from voter lists of the district or division where the court is convened, and the second is the determination of disqualifications, exemptions, and excuses on the basis of objective criteria only. The Act seeks to eliminate the discretion that had previously been vested in jury commissioners by virtue of the key man system that was widely in use in the Federal courts. The key man system had provided opportunities for conscious discrimination, and, in addition, by its very nature it inevitably also led to unintentional discrimination.

Voter registration lists were selected as the primary source for prospective jurors' names. These lists were considered to be the most available sources across the country which also included a large enough number of names to assure a broad base for selection. It was recognized that in certain locations these lists would have to be supplemented by other lists when the cross-sectional goal of the legislation was not being achieved. 28 U.S.C. § 1863(b)(2). The Act therefore envisions an affirmative duty upon the administrators of the jury selection system to achieve as broad a cross section as is reasonably possible.

Objective standards for the determination of qualifi-

cation, exemption, and excuse were designed to work with random selection to achieve a representative cross-section of the community. No longer can jury commissioners or judges impose their own subjective standards of "common sense, intelligence, or probity," but rather the standards in the Act are the maximum allowed. The use of subjective standards was eliminated because they tended to frustrate the cross-sectional goal.

Congress recognized and felt that juries should reflect the community sense of justice. In order to do this, each segment of society must be represented. The intent of Congress was not only to eliminate discrimination, but also to achieve as representative a cross section as possible, without regard to past instances of discrimination. The elimination of purposeful discrimination was not the primary motivation behind the legislation.

Constitutional challenges were set apart from the Act. The authors felt that challenges would only lie for failure to achieve procedural regularity. Prejudice is not required to be shown by a party challenging the grand or petit juries; the only burden under the Act is demonstrating a "substantial failure" to comply with the provisions of the Act. 28 U.S.C. § 1867(a), (d).

The factual situation of the instant case clearly falls within the scope of Congress' intent. There was an admission by the chief judge of the district court that blacks and the Spanish-surnamed were underrepresented on the jury wheels. Such an underrepresentation should have triggered a search for supplemental source lists. 28 U.S.C. § 1863(b)(2). Since Congress' 1972 amendment, requiring an answer to the question on race by a

prospective ju[illegible] the questionnaire, was made in order to mo[illegible]e success of the statutory scheme in achieving a [illegible] section of the community, it is clear that a li[illegible] nallenging the results of the selection system [illegible] ot have to satisfy the more onerous burden [illegible] emonstrating "purposeful discrimination." The C[illegible] essional intent was to achieve a broad cross-se[illegible]n; it is therefore enough for a challenging litigan[illegible] demonstrate that such a cross-section has not been achieved.

2. Petitioner fulfilled the threshold requirements of the Act concerning access to non-public jury documentation. He filed a sworn statement in compliance with § 1867(d); this statement alleged facts which, if true, would have constituted a substantial failure to comply with the requirements of the Act. The cases which have denied such discovery have done so either because no sworn statement was filed, the sworn statement was insufficient, or the allegations would not have constituted a violation of the Act. The statement herein has none of these deficiencies, so Petitioner should have been granted the opportunity to discover the pertinent jury documentation. Only through such inspection could he attempt to prove his claim of significant underrepresentation of blacks, Chicanos (the Spanish-surnamed), and other groups. The case should therefore be remanded for an evidentiary hearing on Petitioner's claim, and he should be given access to the jury wheels, etc.

Furthermore, Petitioner made out a claim of sufficient constitutional dimension to warrant his being granted access to the jury lists regardless of whether the Jury Act is broader in scope and intent than the

constitutional decisions, which require a showing of systematic exclusion or purposeful discrimination. The concession by the district court that the Spanish-surnamed were underrepresented and the thrust of Petitioner's argument that the voter registration lists were being used in a discriminatory fashion constitute sufficient evidence to merit an evidentiary hearing on Petitioner's allegations, and to afford him an opportunity to inspect the relevant jury documentation.

ARGUMENT

I. BECAUSE THE LEGISLATIVE HISTORY TO THE JURY SELECTION AND SERVICE ACT OF 1968 MAKES CLEAR THAT THE ACT IMPOSES AN AFFIRMATIVE DUTY UPON THE SELECTION PROCESS THAT IS GREATER THAN MERELY NEGATING DISCRIMINATION, A LITIGANT CHALLENGING COMPLIANCE WITH THE ACT IS NOT REQUIRED TO DEMONSTRATE SYSTEMATIC EXCLUSION OF A COGNIZABLE GROUP IN THE COMMUNITY.

The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* (82 Stat. 53) states in § 1861:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

Section 1862 states:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

Section 1863 implements these sections by requiring each district court to formulate a written plan for the random selection of grand and petit jurors. This plan "shall be designed to achieve the objectives of sections 1861 and 1862." 28 U.S.C. § 1863(a). Briefly, the requirements of § 1863 are that the plan must establish a jury commission or authorize the clerk to manage the selection process. While allowing for local variation, each plan must specify whether voter registration lists or the lists of actual voters shall be the source for the names of prospective jurors in the district or division. Each political subdivision is to be proportionally represented, and the plan must specify a procedure that will "ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes." 28 U.S.C. § 1863(b)(3). The names selected from the source lists must be placed in a "master jury wheel"; this wheel must contain one-half of one percent of the total number of persons on the basic source list, or, if this is too cumbersome, a smaller number, but no less than one thousand. 28 U.S.C. § 1863(b)(4). The local plan must also specify those groups which are eligible for excuse or exemption, but only after a finding that the excuse or exemption of such persons would not be inconsistent with the aims of §§ 1861 and 1862. 28

U.S.C. § 1863(b)(5) and (6). Upon review by the judicial council of the particular circuit, which review is to determine that the plan complies with the provisions of the Act, the plan is to go into effect. 28 U.S.C. § 1863(a). If the reviewing panel finds that the plan does not comply with the Act, it must direct the district court to remedy the defects.

While § 1863(b)(2) states that either the voter registration lists or lists of actual voters are to be the primary source for prospective jurors' names, it also states that "[t]he plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862." 28 U.S.C. § 1863(b)(2).

The Act further provides for the random selection of names from the master jury wheel, and the sending of questionnaires to these prospective jurors. 28 U.S.C. § 1864. The eligibility for service of persons who complete the questionnaires is to be determined on objective criteria based upon the responses to the questionnaire. 28 U.S.C. § 1865. Persons who qualify and are not otherwise exempt or excused are to be placed in a "qualified jury wheel," from which the ultimate grand and petit jury venires are selected, at random. 28 U.S.C. § 1866.

There is also a provision for challenging compliance with the Act, either by the defendant or the Attorney General in a criminal case, or by the parties in civil cases. 28 U.S.C. § 1867.

Despite the apparently clear language of §§ 1861 and 1862, especially when read in conjunction with the language of § 1863(b) requiring the random selection of

a fair cross section of the community, and also requiring the supplementation of voter lists when they are inadequate to achieve the cross-sectional and non-discriminatory goals of §§ 1861 and 1862, the Court of Appeals for the Ninth Circuit has imposed a heavy burden upon any litigant challenging compliance with the Act.

In effect, these cases[1] require a showing of the systematic exclusion of a cognizable group from the jury pool, and hold that the use of voter registration lists as the source of prospective jurors is not invalid unless there is a showing of electoral discrimination against the group(s) in question. As such, these cases appear to adopt the constitutional doctrines set forth by this Court in its 14th Amendment decisions such as *Whitus v. Georgia*, 385 U.S. 545 (1967), and *Hernandez v. Texas*, 347 U.S. 475 (1954). At least one panel of the Second Circuit seems to have adopted this rationale. *United States v. Guzman*, 468 F.2d 1245 (CA 2 1972), cert. denied 410 U.S. 937.[2]

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[1] See *United States v. James*, 453 F.2d 27 (CA 9 1971); *United States v. Bennett*, 445 F.2d 638 (CA 9 1971), cert. denied 404 U.S. 1023; *United States v. Parker*, 428 F.2d 488 (CA 9 1970), cert. denied 400 U.S. 910.

[2] Part of the *Guzman* decision may be based upon the Second Circuit's serious doubts as to whether the age groups involved were "cognizable" for the purposes of the Act, particularly since age is not one of the factors mentioned in §1862. 468 F.2d at 1248.

The rationale of the Ninth Circuit cases is also open to question, for the operative language of *United States v. Parker*, 428 F.2d 488, concerning the requirement of showing "systematic exclusion" was made with respect to a grand jury that had been empanelled *prior* to the effective date of the Jury

The issue thus presented in this case is whether the intent of the Jury Selection Act is broader than the systematic exclusion cases. If the Solicitor General is correct in his contention that Petitioner did not really allege or make a showing of systematic exclusion,[3] and if the Jury Selection Act is not broader in scope than *Whitus*, etc., then Petitioner was not prejudiced by the district court's failure to allow inspection of the jury wheels and questionnaires. If, on the other hand, the Act imposes an affirmative burden to formulate a plan for juror selection that does more than merely negate discrimination, but instead as nearly as possible achieves a representative cross-section of the community, then Petitioner was prejudiced by the failure to allow

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Selection Act of 1968. Indeed, the Court of Appeals there recognized this distinction and did not discuss the challenge under the standards of the 1968 Act. Thus, while the Court of Appeals did hold that the use of voter registration lists was not improper *per se*, it also stated that such use was not "*constitutionally* invalid." 428 F.2d at 489. The later cases cite *Parker*, but they are also at least partly based upon the failure of the defendants involved to offer any proof to substantiate their claims of underrepresentation. See *United States v. James*, 453 F.2d 27, 29; and *United States v. Bennett*, 445 F.2d 638, 641. These cases are therefore distinguishable from the case at bar to the extent that they rely on the *Parker* standard as being proper under the Act, and they are also distinguishable on the question of proof presented. Here, any attempt to offer proof was completely frustrated by the district court's denial of the motion to inspect the jury wheels and questionnaries. See argument II, *infra*.

[3] Memorandum for the United States, at 5-6.

inspection, regardless of whether he made out a valid claim of systematic exclusion.[4]

This Court has not yet directly decided this issue. While the Court did speak of "purposeful discrimination" in *Hamling v. United States*, ___ U.S. ___, 94 S. Ct. 2887 (1974), the issue there raised by petitioners was the exclusion of persons under the age of twenty-four from the master jury wheel. Since the master wheel had last been refilled in 1968, and since Hamling's trial took place in 1971, all persons on the petit jury venire must have been at least twenty-four.[5] The question presented in *Hamling* was thus how often the master jury wheel had to be refilled. This Court stated that

> some play in the joints of the jury selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury [is] drawn from a cross-section of the community," *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Smith v. Texas*, 311 U.S. 128, 130 (1940), at the same time take into account practical problems in judicial administration. Unless we were to require the daily refill-

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[4] Several decisions have pretermitted the question of whether the Jury Selection Act is broader than the "systematic exclusion" cases. See, *e.g.*, *United States v. Dellinger*, 472 F.2d 340, 365 (CA 7 1972); *United States v. Deardorff*, 343 F.Supp. 1033 (S.D.N.Y. 1971), aff'd sub nom. *United States v. Kahn*, 472 F.2d 272 (CA 2 1972), cert. denied 411 U.S. 882 (1973). But see *United States v. McDaniels*, 370 F.Supp. 298, 301-302 (E.D.La. 1973), which determined that significant underrepresentation is all that a defendant must show in order to prevail on a challenge under the Act.

[5] Brief for Petitioner Hamling, at 87.

> ing of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice. (footnote omitted) ___ U.S. ___, 94 S.Ct. at 2917-2918.

This Court then held that the focus of a challenge must be on the makeup of the master wheel at the time of its refilling, and if it is not discriminatory at that time, then a "purposeful discrimination" has not occurred. While this Court did cite *Whitus v. Georgia* 385 U.S. 545 (1967); *Avery v. Georgia*, 345 U.S. 559 (1953); and *Alexander v. Louisiana*, 405 U.S. 625 (1972), it is clear that the thrust of *Hamling* was directed at administrative convenience and necessity, and not to whether the scope of the Act is broader than these cases, particularly when racial and other classes were involved. Indeed, the question of the scope of the Act was not briefed or apparently argued.[6]

The questions involved herein therefore require that we go beyond the apparently clear language of §§ 1861-1863 and examine the legislative intent as demonstrated by the legislative history to the Act.

The bill that eventually became the Jury Selection and Service Act of 1968 was introduced in the Senate in 1967 by Senator Joseph D. Tydings, Chairman of the Sub-committee on Improvements in Judicial Machinery of the Committee on the Judiciary. As part of a proposed review of procedures for the selection of jurors in federal courts, Sen. Tydings held hearings on seven proposed bills before his subcommittee.[7]

[6] Brief for Petitioner Hamling, at 87-94.

[7] "Federal Jury Selection," Hearings Before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, 90th Cong., 1st Sess. (1967) [hereinafter referred to as "Hearings, 'Federal Jury Selection' "].

The history of jury selection in the federal courts prior to 1967 is surprisingly barren for a system for which it is an "established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

The First Judiciary Act of 1789 established that jurors in federal courts would be selected in conformity with the standards used in each state. This act also required that the system used in the federal courts would be that of the States as of the date of enactment. An act of 1800 amended this static conformity date from 1789 to 1800. The Act of July 20, 1840, departed from the static conformity date and allowed each federal court to change its procedures from time to time to be current with changes in state law.[8]

The 1875 Civil Rights Act modified these procedures by prohibiting disqualification from jury service because of race, color, or previous condition of servitude. Selection procedures continued basically in this vein until the 1940's. During the interim, criteria for qualification had multiplied to include age, citizenship, good moral character, ability to read, write, speak or understand English, mental capacity, status as a property owner, residence, sex, status as a taxpayer, sobriety, status as a voter, criminal record, status as a poll taxpayer, and prior jury service. Exemptions had also increased, so that by 1941 there were sixty-eight classes of exemptions in the various states.[9]

[8] 114 Cong. Rec. 6608-6609 (1968) (remarks of Sen. Tydings).

[9] *Id.* at 6609.

In 1941, the Judicial Conference of the United States appointed a committee, under the chairmanship of Judge John C. Knox, to study the manner of selection of jurors in the federal courts. The committee's report, commonly referred to as the "Knox Report," was completed in 1943. One of the recommendations of that committee was the adoption of uniform qualifications for jurors in federal courts.[10] In 1948 Congress partially created independent federal qualifications for jurors, but the criteria of the states was also continued, and no guidelines for the actual selection process were provided.[11] 28 U.S.C. § 1861 et seq. (1948 ed). In 1957, as part of the Civil Rights Act, § 1861 of title 28 was amended to establish totally independent federal qualifications for federal jurors. All reference to state qualifications was eliminated.[12] However, these standards were not administered uniformly; some courts treated them as minimum standards to which subjective notions of commonsense and probity were often added.[13] The Judicial Conference undertook a new review to update the Knox report. This 1960 report demonstrated that problems still remained in selecting

[10]Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353, 354-55 (1967) [hereinafter referred to as the "Kaufman Committee Report"].

[11]114 Cong. Rec. 6609 (1968) (remarks of Sen. Tydings).

[12]*Ibid.*; Kaufman Committee Report, 42 F.R.D. at 355.

[13]S. Rep. No. 891, 90th Congress, 1st sess., at 9.

the source for the names of prospective jurors. Nonetheless, the report recommended that the standards of selection and the source of names should be left to the sound discretion of each district rather than to legislation imposing some kind of uniformity.[14]

In 1962, a bill proposed by the Judicial Conference was introduced in the 88th Congress, and by 1966 there were thirty-four bills pending that concerned the jury system.[15] In 1966, the House passed H.R. 14765, title I of the Administration's 1966 civil rights bill. While it was filibustered in the Senate, it pointed up the necessity for reform.

Also making obvious the need for reform was the decision of the en banc Fifth Circuit in *Rabinowitz v. United States*, 366 F.2d 34 (CA 5 1966). That case held the operation of the "key man" system in one district deprived the defendants of a jury that was a representative cross section of the community. The key man system used certain persons as suggesters of the names of prospective jurors. The defects of such a system were later pointed out by a number of witnesses at the Tydings' committee hearings. Among them was Judge Joseph S. Lord, III, of the eastern district of Pennsylvania, whose district used the key man system. He stated:

> I do not doubt that the key man method may result in juries which are fairly representative of the community of which they are part, both geographically and in terms of those infinitely

[14]Kaufman Committee Report, 42 F.R.D. at 355-56.

[15]*Id.* at 356-57; 114 Cong. Rec. 6609 (remarks of Sen. Tydings).

> more subtle characteristics vaguely referred to as political, social, ethnic, and economic background. However, the opportunities for unintentional abuse of the system are grave.* * * Even when the key men are so chosen that they do represent all segments of our pluralistic citizenry, there is no inherent guarantee that they themselves will recruit and recommend individual jurors who collectively embody the will of the community. Even more unlikely is it that the system can continue to function with evenhanded representative justice. For every time the community changes, in terms of the political outlook of its members, their economic and social status, their ethnic and cultural composition, and of course their geographical distribution, the perpetuation of the same key men works obvious impropriety. Yet how can court administrators and judges gauge subtle, nuanced changes in societal attitudes and find the appropriate key men to accompany these increasingly fluid developments.[16]

The bill that eventually became the Jury Selection and Service Act of 1968 was drawn in response to these problems, as well as others that were recognized. It was drafted by the Judicial Conference's Committee on the Operation of the Jury System, chaired by the Hon. Irving R. Kaufman of the Court of Appeals for the Second Circuit. In intent it was virtually identical to the Administration proposal, S. 1319, which was title I of the Civil Rights Act of 1967.[17] Virtually all of the thirty-nine witnesses before the Tydings' subcommittee supported one or the other of these two bills and opposed the other five proposals. At the conclusion of

[16]Hearings, "Federal Jury Selection," at 75-76, quoted in S. Rep. No. 891, at 11.

[17]Hearings, "Federal Jury Selection," at 23-35, 37-38.

the hearings, the subcommittee decided to report out an amended version of the Judicial Conference bill, for it gave more flexibility to the various districts,[18] and this bill eventually became law.

The bill, as amended, embodied two basic themes: (1) random selection from voter lists of the district or division where the court was convened, in order to assure a representative cross section of the community on the jury wheel, and (2) objective bases for determining qualification for, and exemption and excuse from service.

> These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness. S.Rep. No. 891, at 15; H.R. Rep. No. 1076, 90th Congress, 2d sess., 1968 U.S. Code Cong. & Ad. News 1792, 1793 (1968) [hereinafter referred to as "H.R. Rep. No. 1076"].

See also S. Rep. No. 891, at 9, 25-26; H.R. Rep. 1076, at 1792, 1798.

The bill was designed to do away with the discretion that had previously been vested in the jury commissioners, and it was also intended to give each qualified person an equal opportunity to be considered for jury service, as well as broadening the base for selection in order to achieve the cross sectional goal. Thus, Congressman Celler, Chairman of the House Committee on the Judiciary, which considered and amended the proposed legislation after its passage by the Senate, stated on the floor of the House:

[18]S. Rep. No. 891, at 13.

> [T]he true administration of justice is the firmest pillar of good government. This legislation embodies that belief. It is committed to the goal of impartial administration of justice and the essential value of broad community participation in Federal juries. 114 Cong. Rec. 3991 (1968).

In order to achieve these goals, three basic means were formulated. The first was random selection from the source lists. Random selection was decided upon in order to do away with the discretion that was inherent in the key man system, and it was also intended to do away with any further inducements for discrimination.

> [R]andom selection eliminates the key man system and ensures that jurors will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion. It is for this reason that random selection traditionally has been the method used to select juror names from the qualified jury wheel. The bill simply extends this principle backward in time to encompass the method used to obtain the names placed in the qualified jury wheel. It thus virtually eliminates the possibility of impermissible discrimination and arbitrariness at all stages of the jury selection process, and thereby tends to ensure that the jury list will be drawn from a cross section of the community.
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> S. Rep. No. 891, at 16 (footnote omitted).

See also the testimony of Judge Kaufman before the Tydings subcommittee, Hearings, "Federal Jury Selection," at 265.

The need for the elimination of the key man system was not restricted to the abhorrence of intentional discrimination. Rather, the system also allowed unintentional discrimination. See, *e.g.*, *Rabinowitz v. United States*, 366 F.2d 34 (CA 5 1966). Another witness before the Tydings subcommittee, Prof. Edwin S. Mills of Johns Hopkins University, who had conducted a statistical study of a key man system in the U.S. District Court for the District of Maryland from December, 1958 to December, 1961, testified as to the inevitable effects of such a discretionary system:

> It is almost humanly impossible to avoid biases of the kind * * * found when jurors are selected by the key man system. First, people known to prominent individuals or associated with almost any kind of organization will display an occupational bias. Second, it is well known among statisticians that any sampling procedure involving human discretion almost inevitably leads to biased results. No matter how conscientiously they try to choose randomly, human beings almost always choose biased samples.
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> Hearings, "Federal Jury Selection," at 75-76, quoted in S. Rep. No. 891, at 11.

The Kaufman Committee also recognized the defects of the key man system:

> Perhaps more important, the haphazard nature of the process does not insure that each qualified citizen will have an opportunity equal to that of every other qualified citizen to be considered for jury service. Kaufman Committee Report, 42 F.R.D. at 361.

Secondly, voter registration lists were selected as the primary source list because they were the single source most uniformly available across the country that at the same time provided as broad a base for selection as was reasonably possible. The Senate Report to the legislation states the reasoning behind the selection of such lists in the words of then-Attorney General Ramsey Clark:

> We looked at every type of list we could find. We looked at post office addresses, at Civil Service Commission lists, at Social Security lists, and we considered telephone books, and a city directory sort of list, and we couldn't find any list that would be across the country nearly as good as the voter list. Hearings, "Federal Jury Selection," at 43, quoted in S. Rep. No. 891, at 16.

Professors Harry Kalven and Hans Zeisel of the Chicago Jury Project also testified in support of the use of voter lists:

> Now which lists are under consideration? Telephone lists have the disadvantage that they have an economic bias. * * * City directories, to the extent that they exist, are a good source, although they have the difficulty that they contain also non-U.S. citizens, and therefore have a lot of names which have to be screened out. * * * But the major argument against using city directories is that they are available only in very few cities. * * * When all is said and done, we believe that the voter registration list is by far the most desirable list as the foundation of the juror selection process. We don't mean necessarily that the voter list should be the only one. If it is found seriously deficient, as it might be in some areas, then by all means it should be supplemented by other lists, but I think from the point of view of the statistician who wants to obtain a representative cross section of the population, the voter list is by far the most desirable source. Hearings, "Federal Jury Selection," at 131, quoted in S. Rep. No. 891, at 16-17.

The voter lists were recognized to have limitations,[19] but they were still selected, partly because of their availability, and partly because they provided a sufficiently broad source of names. The Kaufman Committee, for example, felt that any deficiency in the voter lists could be remedied by the supplementation provisions of § 1863(b)(2). Kaufman Committee Report, 42 F.R.D. at 361-62; statement of Hon. Irving R. Kaufman, Hearings, "Federal Jury Selection," at 253.

Finally, objective standards for qualification, exemption, or excuse were designed to work with random selection to produce juries that would result in a representative cross-section of the community.

> The second principle—determination of disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only—is designed to work with random selection to produce juries that represent the community fairly. In essence, this principle would prohibit the widespread current practice of imposing qualifications above and beyond those specified by Congress. S. Rep. No. 891, at 17-18; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1795.

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[19] Professors Kalven and Zeisel themselves testified that census lists would provide a better source from a statistical point of view, were they available and if they could be updated in the later years of each decade. Hearings, "Federal Jury Selection," at 139. See also the statement of Lawrence Speiser, Director of the Washington, D.C., office of the American Civil Liberties Union, who said that the sole use of voter registration lists "narrow[s] the base of jury selection and in so doing cast[s] aside the persuasive evidence that jury service is a powerful means of education in the democratic process, even for those previously apathetic about their civic responsibilities." Hearings, "Federal Jury Selection," at 334.

The Senate and House Committees on the Judiciary found that the use of subjective standards allowed too much opportunity for bad faith interpretation by the clerk or jury commissioners:

> [I]n districts where subjective screening takes place now, the judges of the Judicial Conference Committee learned that a "prospective juror may be considered unfit for jury service because a clerk thinks his appearance is sloppy, or his [formal] education is deficient, or because he is not very articulate, or speaks with an accent, or appears nervous. * * *" Impressions such as these are likely to form the basis for a stereotype of a "good juror" that will be used by interviewers to reject all who do not meet its narrow criteria. Thus, even if interviewers always act in good faith, they will tend to produce distorted juries that do not speak with the voice of the community.
>
> In addition, the undefinable contours of subjective criteria provide opportunities for discrimination by the occasional official who acts in bad faith.
> S. Rep. No. 891, at 19 (footnote omitted).

See also the testimony of Judge Kaufman, Hearings, "Federal Jury Selection," at 266, and that of Joseph L. Rauh, Jr., general counsel, Leadership Conference on Civil Rights, *id.* at 303-304. In addition, such subjective standards as "common sense, intelligence, information and probity" were found to be unworkable. S. Rep. No. 891, at 19; testimony of Judge Kaufman, Hearings, "Federal Jury Selection," at 261, and the testimony of Judge Lord, who stated

> that when you get into relative terms, like common sense, you are dealing with very, very dangerous language and with very, very dangerous standards. If we are going to have a true random cross section and truly random selection, then I think the qualifications should not be dependent on such things, such intangibles, as probity, common sense, and so forth. *Id.* at 77, quoted in S. Rep. No. 891, at 24.

Furthermore, it was recognized that the use of such subjective standards would likely defeat the cross sectional goal of the legislation. *Ibid.* Joseph L. Rauh, Jr., made a similar statement that illustrates much of the testimony received by the Tydings committee:

> The creation of additional tests concerning intelligence, integrity, morality and common sense would negate the very principle of equality reflected in the phrase "a jury of his peers." * * * Worst of all, by creating a vague subjective test * * * the mechanical application of random sampling is defeated and the certainty of equality predicated on objective tests is totally lost. *Id.* at 24-25, quoting Hearings, "Federal Jury Selection," at 290.

The Kaufman Committee came to a similar conclusion. It said in its report:

> The committee is in accord with those who emphasize the importance of obtaining competent jurors, but it believes that "the desire for competency must not be pursued to the extent that a fair cross-section is prevented." *Rabinowitz v. United States*, 366 F.2d 34, 55 (5th Cir. 1966). Kaufman Committee Report, 42 F.R.D. at 363.

Similarly, excuse categories were limited, both in order to "upgrade the competence" of juries by having fewer professional people excused, as well as to enhance the cross sectional goal. S. Rep. No. 891, at 23-24; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad.

News at 1797, 1805; testimony of Prof. Kalven and Zeisel, Hearings, "Federal Jury Selection," at 132-33. Therefore, juror fees were increased:

> The subcommittee hearings established a record of unanimous support for increases that would make jury and witness service less burdensome. To the extent that the burden is diminished, hardship excuses may decline with consequent enhancement of representative participation on juries. The testimony of William Walsh, chairman-elect of the American Bar Association's Section of Criminal Law, is illustrative:
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> "It should not be a matter of financial sacrifice for a man to serve as a juror. Otherwise qualified jurors, whose salary would be affected by jury service, try to take advantage of other grounds for excuse from jury service when their real reason for requesting relief is economic hardship." S. Rep. No. 891, at 36 (footnote omitted).

The intent of Congress was therefore to obtain as broad a base as possible for jury service and to remedy the defects of the key man system. Above all, moreover, there was a recognition of and a dedication to the proposition that the jury should reflect the community sense of justice. Thus, the committee reports state:

> Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result–biased in the sense that they reflect a slanted view of the community they are supposed to represent. *Id.* at 24; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1797.

Judge Kaufman made a similar statement:

> If the law is to reflect the moral sense of the community, the whole community--and not just a special part–must help to shape it. If the jury's verdict is to reflect the community's judgment–the whole community's judgment–jurors must be fairly selected from a cross-section of the whole community, not merely a segment of it. Hearings, "Federal Jury Selection," at 256.

And see the comments of Congressman Rodino, a member of the House Judiciary Committee, on the floor of the House:

> A just verdict is most likely when the panel properly reflects a cross section. It is no more desirable to have a panel composed entirely of bankers and executives than it is to have one consisting only of laborers. 114 Cong. Rec. 4000-4001 (1968).

In order to achieve this cross-section, a provision was contained in the Act for supplementation of the voter lists when the latter failed to fairly represent the community:

> The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. 28 U.S.C. § 1863(b)(2).

As originally passed by the Senate, this subsection allowed the total substitution of other sources for the voter lists if supplementation would not be sufficient. The Senate Report states:

The bill requires that the voter lists be supplemented by other sources whenever they do not adequately reflect a cross section of the community. * * *

The voting list requirement, together with the provision for supplementation or substitution, is therefore the primary technique for implementing the cross sectional goal of this legislation. The bill uses the term "fair cross section of the community" in order to permit minor deviations from a fully accurate cross section. The voting list need not perfectly mirror the percentage structure of the community. *But any substantial percentage deviations must be corrected by the use of supplemental sources.* Your committee would leave the definition of "substantial" to the process of judicial decision. S. Rep. No. 891, at 17. (emphasis added).

The comment to section 1863 states:

Subsection (b)(2) [of § 1863] contains the fundamental requirement that voter lists be used as the basic source of juror names. * * * Moreover, *the bill recognizes that in some areas voter lists of all kinds may be insufficient to implement the policies of the act, by reason of local voting practices. Where that is true, the plan must prescribe other sources to supplement the voter lists.* *Id.* at 27 (emphasis added).

The House changed this subsection to make clear that only supplementation of the voter lists, rather than total supplantation in some cases, was permitted. However, the House Report contains the same language as above in its comments on the bill. 1968 U.S. Code Cong. & Ad. News 1792, at 1794, 1799-1800.

The intent of this subsection is further pointed out by a colloquy between Senator Ervin and Attorney General Clark at the Senate subcommittee hearings. Senator Ervin questioned the need for § 1862 if random selection was designed to achieve the cross-section objective, and the Attorney General replied that § 1862 contained the standards that had to be looked to in evaluating the effectiveness of the selection procedures:

Attorney General Clark: * * * [T]he bill recognizes the possibility that there may be areas where [a fair reflection of the community] is not the fact, and it instructs the Judicial Council to provide a balance.

Senator Ervin: In other words, you are not satisfied that it selects them at random and that is the purpose in putting in these other things? Is that the object in putting them in?

Attorney General Clark: No, the selection at random is all right if your list is all right. The question is whether your voter list is all right. If it is, then the procedure is adequate in that jurisdiction. If it is not, then the Judicial Council would have to look to a supplementation of the list.

Hearings, "Federal Jury Selection," at 60.[20]

See also the Kaufman Committee Report, 42 F.R.D. at 361-62.

This and other portions of the legislative history make it clear that the Jury Selection Act was designed

[20]While Attorney General Clark's comments were in regard to S. 1319, the Administration bill, its provisions were very similar to that of S. 989, the bill that eventually passed. *Compare* §1864(a) of S. 1319 *with* §1863(b)(2) of S. 989. *Id.* at 24,30. See also *id.* at 171 (testimony of Prof. Kalven), and the statement of William L. Marbury, *id.* at 90.

not only to eliminate discrimination, but also to seek as representative a cross-section as possible. Congress was not only concerned with meeting constitutional requirements; it also wanted to make this legislation a model of fairness in achieving a truly representative jury – one representative of all segments of the population – without regard to whether there was evidence of past discrimination.

Thus, Congressman McCulloch, of the House Committee on the Judiciary, stated:

> If purposeful discrimination were the sole basis for this legislation, perhaps the need would not be clear; but the impact of S. 989 is much greater than that of civil rights legislation.
>
> For the real issue in this bill is whether a jury trial should be a trial before aristocrats or a trial before our peers. Thus the issue transcends our present problems of racial discord. The bill asks the question whether a nation dedicated to representation of the people in its legislative halls will adhere to the same principle in its courts.
>
> S. 989 says that it must. I agree. 114 Cong. Rec. 3992 (1968).

Judge Kaufman stated before the Tydings subcommittee:

> Now for the first time in our history, Congress has an opportunity to sweep away the injustices in the present system–the discrimination against those who do not live adjacent to the courthouse, against minority groups, and against the poor–and to create a uniform jury-selection system, something that the judges have sought for 23 years.
>
> Congress now has the opportunity to make Federal jury service not an irritating burden to be borne

> by a few who repeatedly serve, but an opportunity for most Americans to participate in the most vital function of government, the meting out of justice. Hearings, "Federal Jury Selection," at 264-65.

Attorney General Clark, in speaking on the defects of the then present system of selection, answered the following question from Senator Tydings:

> *Senator Tydings:* Have there been any notable instances where justice has not been done because of the jury selection procedures now used in the Federal courts?
>
> *Attorney General Clark:* Well, when you say justice has not been done, if you mean reversible error, that is one thing. If you mean a failure to fully reflect all of the qualities of the community, which I would consider an injustice in the system, then I would say, "Yes, this has been something that we see in many districts across the country." It is something that we see almost inherently in the keyman system, and particularly in a major metropolitan area.
> *Id.* at 45; see also, *id.* at 59.

Attorney General Clark, in introducing the Administration's 1967 Civil Rights Act, made this comment concerning title I (S. 1319), which was virtually identical in intent to the bill that became law.[21]:

> While [the present] system appears not to have operated unconstitutionally, in some districts Negro representation on juries has been substantially less than the proportion of Negroes in the community, and other classes have sometimes been inadequately represented on juries. Where such disparities occur they create an impression of

[21] S. Rep. No. 891, at 15.

> unfairness in the judicial system of the United States—an impression which should be scrupulously avoided if we are to foster respect for the rule of law. 113 Cong. Rec. 3954, 3955 (letter of Attorney General Clark) (1967).[22]

Clearly, Congress was seeking to achieve the best and fairest selection system possible, one that would not only be fair for the litigants, but also would foster respect for the law. Congressman Rodino, for example, after stating that a defendant under the then-existing system might be satisfied to challenge the system and have his indictment dismissed, also stated:

> However, the interests of all concerned—of society as well as the litigants—would best be served if, at the outset, the jury-selection process had been free from actual unfairness and from the appearance of unfairness. * * * 114 Cong. Rec. 4001 (1968).

Similarly, Congressman Mathias of the House Committee on the Judiciary stated:

> Certainly, if people have some doubt that they can get absolutely impartial justice, and if they have any question about the administration of justice, then properly I think they would have a lack of confidence in the basic institutions of our Government. This bill will remove some of the questions that have arisen about the ways in which juries are selected and about the possibility that a jury may have some prejudice or bias which would affect the judgment of fact in a given case.* * *

[22]See also Hearings, "Federal Jury Selection," at 288 (statement of Joseph L. Rauh, Jr.); *id.* at 229 (testimony of Eastman Birkett, Assoc. of the Bar of the City of New York); *id.* at 244 (statement of William L. Taylor, Staff Director, U.S. Commission on Civil Rights).

> This bill removes the question of confidence in the judicial system. It insures that there will no longer be any juries composed of an elite, but that every man, in fact, will be judged by his peers, by his equals. This is the thrust and this is the essence of this bill. 114 Cong. Rec. 3992 (1968).

It is clear, then, that Congress was affirmatively seeking to achieve as broad an array as possible in the jury selection process; it was seeking to bring into the initial source list as many persons as could be reached with administrative feasibility. The provisions for flexibility in the number in the master jury wheel (§ 1863(b)(4)), the "periodic" refilling of the master jury wheel (*ibid.*), and the flexibility for a plan for each district (§ 1863(a)) were all intended to insure administrative feasibility. Cf. *Hamling v. United States, supra.* However, the primary intent of the Act is clear, and administrative feasibility cannot supervene or counter it. That intent was that Congress was not only seeking to eliminate discrimination against any group, but was also seeking to insure that all groups in the population would have equal representation in the source list—or at least as equal a representation as was reasonably possible.

It is also abundantly clear that the provisions of §1863(b)(2) impose a duty upon the system to affirmatively seek out other sources for names if any group or groups are not adequately represented. The legislative history states that such supplementation is required when there is a "significant percentage deviation" from an accurate cross section. S. Rep. No. 891, at 17, 27; H.R. Rep. No. 1076, at 1968 U.S. Code Cong. & Ad. News 1794, 1799-1800 [quoted *supra*, at

281. While systematic exclusion has often been demonstrated in the past by a showing of percentage disparities, *Whitus* v. *Georgia*, *supra*; *Hernandez* v. *Texas*, *supra*, it would seem that § 1863 (b) (2) does not incorporate this definition into the statute. First, Congress showed a desire to set constitutional claims aside and apart from the statutory challenge procedure. Thus, § 1867(e) states:

> The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime,* * * may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

The House Report states that this section

> makes clear that the act will not preclude any person or the United States from asserting rights created by other statutes or for enforcing constitutional rights. 1968 U.S. Code Cong. & Ad. News at 1806; see also S. Rep. No. 891, at 35.

Furthermore, Congress foresaw that the nature of a challenge under the Act would be different from a constitutional challenge; it felt that "procedural regularity is the measure of the validity of the selection system. It is an appropriate measure since the bill sets up a largely mechanical process in which the role of human discretion is minimized." S. Rep. No. 891, at

34; H.R. Rep. No. 1076, at 1968 U.S. Code Cong. & Ad. News 1805.[23] The House also amended the bill to eliminate a requirement of a demonstration of prejudice by a challenging party. The House committee felt that such a requirement was more stringent than that even required for a constitutional challenge, and it also felt that such a requirement would "unduly burden the procedure established by the bill for challenging noncompliance." 1968 U.S. Code Cong. & Ad. News, at 1806; 114 Cong. Rec. 3991 (remarks of Representative Celler) (1968). The burden thus remaining for a challenging party is to show that "there has been a substantial failure to comply with the provisions of this title * * *." 28 U.S.C. § 1867(d). According to Webster's Third New International Dictionary, the meanings of "significant" and "substantial" are synonymous. The burdens under § 1863(b)(2) and under § 1867(d) would therefore seem to be the same.

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[23]See also S. Rep. No. 891, at 17:

> If the voter lists are used and supplemented where necessary, and if the procedures outlined in the bill are otherwise rigorously followed, it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross section. The act guarantees only that the jury shall be "selected at random from a fair cross section of the community." It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup. Thus, no challenge lies on that basis. In short, the act attempts to achieve its cross sectional aim by insuring that the basic source list is adequate in that regard and that no procedure is employed that would impermissibly diminish the likelihood that a cross section will be attained. (footnote omitted).

If Congress really meant what it said in § 1863(b)(2) and its accompanying history,[24] then this case would clearly seem to fall within its parameters. Here there was an admission by the chief judge of the district court – the person who was in charge of the local plan for juror selection (App. 3) – that there was an underrepresentation of blacks and Chicanos (the Spanish-surnamed) in the master wheel. (App. 21, 24, quoted *supra*, at 4). Clearly the Act, just as the Fourteenth Amendment, *cf. Hernandez v. Texas, supra*, at 478-79, is not limited to only two classes of persons, blacks and whites. 28 U.S.C. § 1862. Therefore a "substantial" showing of underrepresentation of the Spanish-surnamed would require affirmative relief. 28 U.S.C. § 1867(d); § 1863(b)(2).

If the Act instead requires a showing of systematic exclusion of a group, then the statutory language and legislative history would be meaningless. The legislative history states that the supplementation requirement is not limited to instances where a class or segment of society has been discouraged from registering and/or voting, but it rather embraces situations where "voting patterns" make clear that the lists are deficient. S. Rep. No. 891, at 27 [quoted *supra*, at 28]. Presumably this

[24] At least one commentator has believed that the subsection indeed means what it says. See 5A J. Moore, *Federal Practice* ¶ 47.05 n. 2 [p. 2022]:

> Indeed the subsection [1863(b)(2)] provides that the plan *shall* provide a supplemental source of names in addition to voter lists when necessary to further the policy of the chapter, a provision included, undoubtedly, to avoid frustration of the fair cross-section policy in areas in which registration among certain racial or economic classes is below average. (emphasis in original).

would include instances where a segment of society chose not to register to vote, but was not actively discouraged from vot g. *Id.* at 17, 27. The remarks of Representative McCulloch of the House Committee on the Judiciary bear this interpretation out:

> If purposeful discrimination were the sole basis for this legislation, perhaps the need would not be clear; but the impact of [the Act] is much greater than that of civil rights legislation.
> 114 Cong. Rec. 3992 (1968).

A 1972 amendment to section 1869(h), which previously had not required an answer to the question on the juror questionnaire concerning race and occupation, supports this view. The 1972 amendment (P.L. 92-437, 86 Stat. 740) amended this subsection to make mandatory the answers to race and occupation. Without such a requirement, it had proved impossible to "monitor and enforce nondiscrimination in the selection of Federal jurors." S. Rep. No. 92-1144, 1972 U.S. Code Cong. & Ad. News 3402, 3403. Studies had shown that up to thirty percent of the recipients of questionnaires had failed to respond to the question as to race. Because of this volume of non-response, it became "virtually impossible to detect discriminatory practices under the existing law. One cannot accurately determine whether litigants in the Federal courts are having their matters considered by jurors who represent a 'fair cross section of the community' as required by the Jury Selection Act." *Ibid.* The legislative history concludes:

> The clear purpose of [the amendment] is to end discrimination and to provide a method of enforcing the objectives of the Federal Jury

> Selection Act. This bill seeks to guarantee racial neutrality in the jury selection process. *Ibid.*

The report concluded that while the use of racial identification on juror questionnaires may have led to the discrimination found in *Alexander v. Louisiana*, 405 U.S. 625 (1972),

> the fact that such information was available enabled the selection panel's actions to be challenged. It is to insure the random selection process that the requirements of [the amendment] need to be imposed. The sole object of such indentification is to fulfill the policy objectives of the Federal Jury Selection Act. *Id.* at 3404.[25]

If data on race, etc., is needed to assure the cross-sectional goal, then clearly this goal envisions affirmative steps by the system itself to achieve as broad a cross-section as possible. Why else would it be necessary to "monitor" the results of the workings of the Act – a requirement that is the basis of the 1972 amendment to § 1869(h)? Why else would Congress in 1968 have undertaken such a marked departure from past practice? S. Rep. No. 891, at 10. It is therefore submitted that unlike the apparent interpretation made by the Ninth Circuit in *United States v. Parker, supra; United States v. Bennett; supra;* and *United States v. James, supra;* and by the Second Circuit in *United*

[25]A second 1972 amendment (P.L. 92-269, 86 Stat. 117) reduced the age of jurors from twenty-one to eighteen, also to further the cross-sectional goal. H.R. Rep. No. 92-869, 1972 U.S. Code Cong. & Ad. News 2222, 2223. It also amended the requirements of "periodic emptying and refilling" of the master jury wheel, 28 U.S.C. §1863(b)(4), to be at least every four years, beginning with a refilling no later than September 1, 1973, to include names from the 1972 general election. *Ibid.*

States v. Guzman, supra, the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, goes well beyond merely attempting to end discriminatory practices; rather, it imposes affirmative burdens and goals upon the selection system to achieve a truly "fair cross section of the community." The necessary corollary of this statutory intent is that a litigant challenging compliance with the Act does not have to demonstrate a "purposeful discrimination" on the part of the clerk or jury commissioner, but rather only has to show a significant percentage discrepancy between the proportion a group bears to the total population and the proportion on the jury lists. S. Rep. No. 891, at 17, 27; H.R. Rep. No. 1076, 1968 U.S. Code Cong. & Ad. News at 1794, 1799. Since at the very least Petitioner herein alleged a significant underrepresentation in the trial court, he was prejudiced by the court's failure to allow him to inspect the master and qualified jury wheels and other relevant documentation.

II.

SINCE PETITIONER SATISFIED BOTH THE REQUIREMENTS OF THE JURY SELECTION ACT AND THE SYSTEMATIC EXCLUSION CASES, HE SHOULD NOT HAVE BEEN DENIED ACCESS TO THE JURY LISTS AND OTHER RELEVANT DOCUMENTATION.

A. Petitioner Fulfilled the Threshold Requirements under the Act, and He Therefore Should Have Been Afforded Discovery of the Jury Documents.

The Jury Selection Act, in § 1867, sets up a procedure for challenging compliance with the Act. Petitioner complied with the requirements of § 1867(a), for he filed a timely motion to dismiss the indictment and/or quash the array on the grounds that certain segments of the society were excluded from the master and qualified jury wheels. (App. 11-12). Subsection (d) creates the following threshold requirement to discovery of non-public materials:

> Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence.

Petitioner, through counsel, filed an affidavit in support of his motion to inspect the relevant jury documentation. This affidavit reported the results of a similar challenge in the state courts which showed that the Spanish-surnamed and persons between the ages of twenty and thirty were very significantly underrepresented. (App. 15-16). Because the system used in the state courts was similar to that used by the district court herein, the statement alleged that there was probable cause to believe that similar marked disparity was present in the Federal court system. (App. 16). If true, this significant disparity would certainly constitute a "substantial failure" to comply with the provisions of the Act.[26] 28 U.S.C. § 1867(a), (d). See, *e.g.*, the legislative history to § 1863(b)(2), which states that "any substantial percentage deviations" from the cross-sectional goal must result in the supplementation of the voter lists with other sources. S.Rep. No. 891, at 17; H.R. Report No. 1076, *supra*, at 1794. In addition, the Colorado state courts have recognized that voter lists as the sole source of prospective jurors' names are inadequate. Colorado Rules of Jury Selection and Service, Colorado Revised Statutes, 1963, vol. 1 (1973 Cumul. Supp.). The goal of the latter rules, like that of the Jury Selection Act, is "to provide for jury service by persons selected at random from a fair cross section of all citizens qualified to serve." Rule 2, *id.* However, Rule 7(b)(i) requires the supplementation of voter registration lists with other lists, including city directories, motor vehicle registrations, and drivers' and chauffeurs' licenses. *Id.*

[26] Indeed, the Solicitor General has stated that this affidavit complied with the requirements of § 1867(d). Memorandum for the United States, at 6.

Few cases have interpreted the right to discovery under § 1867(d). Those that have denied discovery can be divided into two categories: (a) those in which no sworn statement was filed, or the statement was insufficient, and (b) those cases in which the basis of the challenge was insufficient as a matter of law. In the former category are such cases as *United States v. James, supra,* 453 F.2d at 29, where no statement was filed, and *United States v. Smaldone,* 485 F.2d 1333, 1346 (CA 10 1973) *cert. denied* 94 S.Ct. 1934, *rehearing pending* (1974), in which the Court of Appeals held that only "conjecture" had been offered in support of the challenge.

In the second category falls *United States v. Guzman, supra,* 468 F.2d at 1249, where the court held that a challenge based on the underrepresentation of 24-30 year olds was insufficient under the Act. In part this was based upon the failure to demonstrate "systematic exclusion," *id.* at 1247 and in part upon the court's serious question as to whether age groups were within the reach of the Act. *Id.* at 1248 n. 6.

Here at least part of Petitioner's claims–those relating to the exclusion of blacks and Chicanos (Spanish-surnamed)–clearly falls within the ambit of 28 U.S.C. § 1862. Indeed the trial court did not doubt this aspect of the claim, but rather apparently denied discovery because it felt its concession that blacks and the Spanish-surnamed were underrepresented made any discovery of the actual lists, etc., unnecessary. (App. 24, quoted at p.4, *supra.*)

Other cases have reached the opposite result. See, for example, *United States v. Ware,* 473 F.2d 530 (CA 9 1973), which bypassed the requirement of a sworn

statement, partly because the Government did not object to the failure to file one, and partly because defense counsel had orally articulated his reasons for his challenge at the time of argument before the district court. Another decision from the Ninth Circuit, *United States v. Beaty,* 465 F.2d 1376 (CA 9 1972), held that a sworn statement is *not* required prior to discovery of the jury lists. While this construction of the statute may well be incorrect, here Petitioner *did* file a sufficient sworn statement, and therefore he should have been granted discovery of the relevant jury documentation. The Tenth Circuit, in dictum, also expressed the view that discovery was a matter of right under the 1968 Act. *United States v. Tijerina,* 446 F.2d 675, 681 n.5 (CA 10 1971).

The legislative history to this section of the statute, though brief, expresses a view in accord with Petitioner's. The Senate Report states:

> In aid of a motion challenging the selection procedure, subsection (d) of new section 1867 entitles the challenging party to present the testimony of the commissioner or clerk if these officials are available. Likewise, the challenging party may obtain relevant official records and papers which are not public or otherwise available. S.Rep. No. 891, at 35.

Since Congress anticipated that the local plan for selection would be a matter of public record, *id.* at 34, it necessarily follows that the records Petitioner was seeking fall within the purview of § 1867(d). A textual analysis of § 1867 also supports this view. Subsection (f) requires that the records used in conjunction with the jury not be disclosed, except as "may be necessary

in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section * * *."

In light of the intent of Congress to secure as broad a base for juror selection as possible, and at the same time monitor the system so that no discrimination would enter, *supra*, at 26-39, the following language from a decision under the prior statute would appear to be equally appropriate under the 1968 Act:

> We believe the District Judge erred, therefore, in not permitting inspection of the questionnaires. This evidence, designed to show the ratio of Negroes to whites on the jury lists, is pertinent to an inquiry into the question of whether there has been a systematic exclusion of Negroes because of race. While this proof is not necessarily controlling, it is, nevertheless, an important factor of substantial value and should be considered by the Court in connection with other evidence pertaining to the method of selection of persons on the jury lists. Confidentiality of the jury questionnaries must accordingly yield to this major consideration. *Mobley v. United States*, 379 F.2d 768, 773 (CA 5 1967).

Since the inspection of the jury records serves the same purpose under the 1968 Act, it was equally erroneous to deny inspection herein. It is therefore submitted that the district court's denial of the opportunity to inspect the jury documentation should be reversed, and the matter should be remanded so that Petitioner will have an opportunity to discover the records and attempt to prove his challenge.

B. Petitioner Made A Sufficient Showing of Constitutional Dimension to Warrant His Being Granted an Evidentiary Hearing and Discovery of the Jury Documentation.

It has long been the law that a conviction cannot stand if it is based upon an indictment of a grand jury or the verdict of a petit jury from which racial or economic groups or other classes have been excluded. *Alexander v. Louisiana*, 405 U.S. 625 (1972), and cases cited therein; *Hernandez v. Texas*, 347 U.S. 475 (1954); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). The burden is on the party alleging systematic exclusion to establish a prima facie case of discriminatory jury selection, but a prima facie case is established when a significant disparity is established between the proportion of the group(s) in the total population and the proportion that the group bears to the total called for jury service. *Hernandez v. Texas, supra*, at 480-81; *Patton v. Mississippi*, 332 U.S. 463 (1947). Neither complete exclusion of a group is necessary to carry the burden of establishing a prima facie case, *cf. Whitus v. Georgia*, 385 U.S. 545 (1967), nor is specific proof of bad faith required. *Avery v. Georgia*, 345 U.S. 559 (1953). While no jury need be a perfect statistical mirror of society, *Swain v. Alabama*, 380 U.S. 202 (1965), token inclusion is equally forbidden. *Brown v. Allen*, 344 U.S. 443, 471 (1953).

The Solicitor General has contended that Petitioner did not really make allegations of systematic exclusion, that the thrust of Petitioner's contention in the trial court was that the use of voter lists resulted in underrepresentation, i.e., a disparity between the population percentage and the jury wheel percentage,

rather than that the lists were compiled in a discriminatory manner or that discriminatory means of selection from the lists were used. Memorandum for the United States, at 5-6. The motion to dismiss the indictment and/or quash the array (App. 11-12) admittedly could have been more artfully drafted, but the real thrust of Petitioner's claim was that the voter registration lists were being used in a discriminatory fashion. This argument is perhaps better illustrated by the hearing on Petitioner's motions in the district court. At that time counsel went further into the results of his state court hearing which was the basis for his affidavit in support of Petitioner's motion to inspect the jury wheels, etc. He showed that the voter registration lists had been anything but even-handed in their results, and he also pointed out that the Colorado Supreme Court had recognized the need for further supplementation of the voter lists. (App. 18-21). Finally, he drew the district court's attention to a Bureau of Census study on the 1968 national election.[27] This study compared the characteristics of the total population with the characteristics of registered voters, and it found that those of lower income, education, job status, youth, and the poor were underrepresented.

Petitioner, moreover, was attempting to comply with the "rule of exclusion" of *Norris v. Alabama*, 294 U.S. 587 (1935) and *Hernandez v. Texas, supra*, by showing that the proportion of blacks and Spanish-surnamed on the jury wheels was much less than their respective

[27]U.S. Department of Commerce, Bureau of Census, Population Characteristics, Voting and Registration in the Election of November, 1968, Series P-20, No. 192 (1969).

percentages in the population as a whole.[28] While no mathematical standards have been set to determine systematic exclusion. *Alexander v. Louisiana, supra*, at 630, most of the successful-challenges have involved the presentation of statistical evidence. Such a showing was made impossible here by the district court's denial of the motion to inspect. There was no doubt in the district court's mind as to whether blacks or the Spanish-surnamed were a cognizable group, *cf. Hernandez v. Texas, supra*, at 479 n.9, so that could not have been the basis for the denial of the motion to inspect.[29]

[28]The inquiry of counsel was focused primarily upon Chicanos, the Spanish-surnamed, for at the time of Petitioner's indictment the list being used did not require a response on the juror questionnaire as to race. 28 U.S.C. §1869(h) (1968). The 1970 Census showed that the Spanish-surnamed or Spanish-speaking over the age of twenty-one represented 10.4% of the total over-21 population of the State of Colorado. The Plan for Selection used by the district court divided the State into three "divisions" – Denver, Grand Junction, and Pueblo. (App. 2-3). Grand Juries were summoned proportionally from the three divisions: 67% from the Denver division, 20% from Pueblo, and 13% from Grand Junction. The statistics in counties reporting 400 or more Spanish-surnamed or Spanish-speaking show that the proportion in the Denver division was 8.9% of those over 21 (77,411 of 864,213); the Pueblo division was 16.5% (46,875 of 284,493); and the Grand Junction division was 9.57% (8680 of 90,684). U.S. Dept. of Commerce, Bureau of Census, General Social and Economic Characteristics – Colorado, Series PC (1), No. C7 (Colo.), Tables 48 and 129; U.S. Dept. of Commerce, Bureau of Census, General Population Characteristics – Colorado, Series PC(1) No. B7 (Colo.) (1971), Table 35.

[29]The Colorado Supreme Court has also recognized that the Spanish-surnamed are a cognizable group. *Montoya v. People*, 141 Colo. 9, 345 P.2d 1062 (1959).

The problem presented by the instant case is similar to that in *United States v. DeAlba-Conrado*, 481 F.2d 1266 (CA 5 1973). There the defendant challenged the petit jury, but only after it had already been empanelled and sworn. The trial court invited counsel to renew his objection in a motion for new trial, but this was not done. The Fifth Circuit therefore held that the defendant's statutory challenge under the Jury Selection Act was barred by the timeliness requirements of § 1867(a). However, the Court of Appeals also felt that defendant's challenge to the denial of jurors with "Latin names", *id.* at 1269, while perhaps not making a strictly cognizable constitutional claim, still had "sufficient constitutional implications" to require a remand and an evidentiary hearing. *Id.* at 1270.

Similarly, at the very least, Petitioner's claims of exclusion of blacks and Chicanos also has "sufficient constitutional implications," regardless of the intent and scope of the Jury Selection Act, so as to require a remand for an evidentiary hearing, wherein Petitioner will have an opportunity to inspect the jury records and attempt to prove his claim.

CONCLUSION

For the reasons stated above, Petitioner respectfully submits that the district court's denial of the opportunity to inspect the jury wheels should be reversed and the case remanded for an evidentiary hearing on the merits of Petitioner's claims.

Respectfully submitted,

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August 1, 1974

APPENDIX A

I. 28 U.S.C. §§ 1861-1869, 1871 (1968)

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

§ 1863. Plan for random jury selection

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. If the reviewing panel finds that the plan does not comply, the panel shall state the particulars in which the plan fails to comply and direct the district court to present within a reasonable time an alternative plan remedying the defect or defects. Separate plans may be adopted for each division or combination of divisions within a judicial district. The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. The district court shall promptly notify the panel, the Administrative Office of the United States Courts, and the Attorney General of the United States, of the initial adoption and future modifications of the plan by filing copies therewith. Modifications of the

plan made at the instance of the district court shall become effective after approval by the panel. Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, adopt rules and regulations governing the provisions and the operation of the plans formulated under this title.

(b) Among other things, such plan shall—

(1) either establish a jury commission, or authorize the clerk of the court, to manage the jury selection process. If the plan establishes a jury commission, the district court shall appoint one citizen to serve with the clerk of the court as the jury commission: *Provided, however,* That the plan for the District of Columbia may establish a jury commission consisting of three citizens. The citizen jury commissioner shall not belong to the same political party as the clerk serving with him. The clerk or the jury commission, as the case may be, shall act under the supervision and control of the chief judge of the district court or such other judge of the district court as the plan may provide. Each jury commissioner shall, during his tenure in office, reside in the judicial district or division for which he is appointed. Each citizen jury commissioner shall receive compensation to be fixed by the district court plan at a rate not to exceed $50 per day for each day necessarily employed in the performance of his duties, plus reimbursement for travel, subsistence, and other necessary expenses incurred by him in the performance of such duties. The Judicial Conference of the United States may establish standards for allowance of travel, subsistence, and other necessary expenses incurred by jury commissioners.

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources

of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

(3) specify detailed procedures to be followed by the jury commission or clerk in selecting names from the sources specified in paragraph (2) of this subsection. These procedures shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes. They shall ensure that names of persons residing in each of the counties, parishes, or similar political subdivisions within the judicial district or division are placed in a master jury wheel; and shall ensure that each county, parish, or similar political subdivision within the district or division is substantially proportionally represented in the master jury wheel for that judicial district, division, or combination of divisions. For the purposes of determining proportional representation in the master jury wheel, either the number of actual voters at the last general election in each county, parish, or similar political subdivision, or the number of registered voters if registration of voters is uniformly required throughout the district or division, may be used.

(4) provide for a master jury wheel (or a device similar in purpose and function) into which the names of those randomly selected shall be placed. The plan shall fix a minimum number of names to be placed initially in the master jury wheel, which shall be at least one-half of 1 per centum of the total number of persons on the lists used as a source of names for the district or division; but if this number of names is believed to be cumbersome and unnecessary, the plan may fix a smaller number of names to be placed in the master wheel, but in no event less than one thousand. The chief judge of the district court, or such other district court judge as the plan may provide, may order additional names to be placed in the master jury wheel from time to time as necessary. The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times.

(5) specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only

if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.

(6) specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt. Such groups or classes shall be exempt only if the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title. The plan shall provide for exemption of the following persons: (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.

(7) fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, on individual request therefor, be excused from jury service on the ground of undue hardship in traveling to the place where court is held.

(8) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

(9) specify the procedures to be followed by the clerk or jury commission in assigning persons whose names have been drawn from the qualified jury wheel to grand and petit jury panels.

(c) The initial plan shall be devised by each district court and transmitted to the reviewing panel specified in subsection (a) of this section within one hundred and twenty days of the date of enactment of the Jury Selection and Service Act of 1968. The panel shall approve or direct the modification of each plan so submitted within sixty days thereafter. Each plan or modification made at the direction of the panel shall become effective after approval at such time

thereafter as the panel directs, in no event to exceed ninety days from the date of approval. Modifications made at the instance of the district court under subsection (a) of this section shall be effective at such time thereafter as the panel directs, in no event to exceed ninety days from the date of modification.

(d) State, local, and Federal officials having custody, possession, or control of voter registration lists, lists of actual voters, or other appropriate records shall make such lists and records available to the jury commission or clerks for inspection, reproduction, and copying at all reasonable times as the commission or clerk may deem necessary and proper for the performance of duties under this title. The district courts shall have jurisdiction upon application by the Attorney General of the United States to compel compliance with this subsection by appropriate process.

§ 1864. Drawing of names from the master jury wheel; completion of juror qualification form

(a) From time to time as directed by the district court, the clerk or a district judge shall publicly draw at random from the master jury wheel the names of as many persons as may be required for jury service. The clerk or jury commission shall prepare an alphabetical list of the names drawn, which list shall not be disclosed to any person except pursuant to the district court plan and to sections 1867 and 1868 of this title. The clerk or jury commission shall mail to every person whose name is drawn from the master wheel a juror qualification form accompanied by instructions to fill out and return the form, duly signed and sworn, to the clerk or jury commission by mail within ten days. If the person is unable to fill out the form, another shall do it for him, and shall indicate that he has done so and the reason therefor. In any case in which it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within ten days. Any person who fails to return a completed juror qualification form as instructed may be summoned by the clerk or jury commission forthwith to appear before the clerk or jury commission to fill out a juror qualification form. A person summoned to appear because of failure to return a juror qualification form as instructed who personally appears and executes a juror qualification form before the clerk or jury commission may, at the discretion of the district court,

except where his prior failure to execute and mail such form was willful, be entitled to receive for such appearance the same fees and travel allowances paid to jurors under section 1871 of this title. At the time of his appearance for jury service, any person may be required to fill out another juror qualification form in the presence of the jury commission or the clerk or the court, at which time, in such cases as it appears warranted, the person may be questioned, but only with regard to his responses to questions contained on the form. Any information thus acquired by the clerk or jury commission may be noted on the juror qualification form and transmitted to the chief judge or such district court judge as the plan may provide.

(b) Any person summoned pursuant to subsection (a) of this section who fails to appear as directed shall be ordered by the district court forthwith to appear and show cause for his failure to comply with the summons. Any person who fails to appear pursuant to such order or who fails to show good cause for noncompliance with the summons may be fined not more than $100 or imprisoned not more than three days, or both. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be fined not more than $100 or imprisoned not more than three days, or both.

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

§ 1866. Selection and summoning of jury panels

(a) The jury commission, or in the absence thereof the clerk, shall maintain a qualified jury wheel and shall place in such wheel names of all persons drawn from the master jury wheel who are determined to be qualified as jurors and not exempt or excused pursuant to the district court plan. From time to time, the jury commission or the clerk shall publicly draw at random from the qualified jury wheel such number of names of persons as may be required for assignment to grand and petit jury panels. The jury commission or the clerk shall prepare a separate list of names of persons assigned to each grand and petit jury panel.

(b) When the court orders a grand or petit jury to be drawn, the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors.

Each person drawn for jury service may be served personally, or by registered or certified mail addressed to such person at his usual residence or business address.

If such service is made personally, the summons shall be delivered by the clerk or the jury commission or their duly designated deputies to the marshal who shall make such service.

If such service is made by registered or certified mail, the summons may be served by the clerk or jury commission or their duly designated deputies who shall make affidavit of service and shall file with such affidavit the addressee's receipt for the registered or certified summons. If such service is made by the marshal, he shall attach to his return the addressee's receipt for the registered or certified mail. As amended Dec. 11, 1970, 84 Stat. 1408.

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person shall be summoned again for jury service under subsections (b) and (c) of this section, or (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. The number of persons excluded under clause (5) of this subsection shall not exceed one per centum of the number of persons who return executed jury qualification forms during the period, specified in the plan, between two consecutive fillings of the master jury wheel. The names of persons excluded under clause (5) of this subsection, together with detailed explanations for the exclusions, shall be forwarded immediately to the judicial council of the circuit, which shall have the power to make any appropriate order, prospective or retroactive, to redress any misapplication of clause (5) of this subsection, but otherwise exclusions effectuated under such clause shall not be subject to challenge under the provisions of this title. Any person excluded from a particular jury under clause (2), (3), or (4) of this subsection shall be eligible to sit on another jury if the basis for his initial exclusion would not be relevant to his ability to serve on such other jury.

(d) Whenever a person is disqualified, excused, exempt, or excluded from jury service, the jury commission or clerk shall note in the space provided on his juror qualification form or on the juror's card drawn from the qualified jury wheel the specific reason therefor.

(e) In any two-year period, no person shall be required to (1) serve or attend court for prospective service as a petit juror for a total of more than thirty days, except when necessary to complete service in a particular case, or (2) serve on more than one grand jury, or (3) serve as both a grand and petit juror.

(f) When there is an unanticipated shortage of available petit jurors drawn from the qualified jury wheel, the court may require the marshal to summon a sufficient number of petit jurors selected at random from the voter registration lists, lists of actual voters, or other lists specified in the plan, in a manner ordered by the court consistent with sections 1861 and 1862 of this title.

(g) Any person summoned for jury service who fails to appear as directed shall be ordered by the district court to appear forthwith and show cause for his failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $100 or imprisoned not more than three days, or both.

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.

(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 1868. Maintenance and inspection of records

After the master jury wheel is emptied and refilled pursuant to section 1863(b) (4) of this title, and after all persons selected to serve as jurors before the master wheel was emptied have completed such service, all records and papers compiled and maintained by the jury commission or clerk before the master wheel was emptied shall be preserved in the custody of the clerk for four years or for such longer period as may be ordered by a court, and shall be available for public inspection for the purpose of determining the validity of the selection of any jury.

§ 1869. Definitions

For purposes of this chapter—

(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States or any authorized deputy clerk;

(b) "chief judge" shall mean the chief judge of any district court of the United States;

(c) "voter registration lists" shall mean the official records maintained by State or local election officials of persons registered to vote in either the most recent State or the most recent Federal general election, or, in the case of a State or political subdivision thereof that does not require registration as a prerequisite to voting, other official lists of persons qualified to vote in such election. The term shall also include the list of eligible voters maintained by any Federal examiner pursuant to the Voting Rights Act of 1965 where the names on such list have not been included on the official registration lists or other official lists maintained by the appropriate State or local officials. With respect to the districts of Guam and the Virgin Islands, "voter registration lists" shall mean the official records maintained by territorial election officials of persons registered to vote in the most recent territorial general election;

(d) "lists of actual voters" shall mean the official lists of persons actually voting in either the most recent State or the most recent Federal general election;

(e) "division" shall mean: (1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: *Provided*, That each county, parish, or similar political subdivision shall be included in some such division;

(f) "district court of the United States", "district court", and "court" shall mean courts constituted under chapter 5 of title 28, United States Code, section 22 of the Organic Act of Guam, as amended (64 Stat. 389; 48 U.S.C. 1424), section 21 of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1611), and section 1 of title 3, Canal Zone Code: *Provided*, That for purposes of sections 1861, 1862, 1866(c) and (d), and 1867 of this chapter these terms shall include the District of Columbia Court of General Sessions and the Juvenile Court of the District of Columbia;

(g) "jury wheel" shall include any device or system similar in purpose or function, such as a properly programed electronic data processing system or device;

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, the race and occupation of a potential juror and any other matter not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form also shall elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his race, color, religion, national origin, economic status, or occupation is not a prerequisite to his qualification for jury service, and that such information need not be furnished if the person finds it objectionable to do so;

(i) "public officer" shall mean a person who is either elected to public office or who is directly appointed by a person elected to public office.

* * *

§ 1871. Fees

Grand and petit jurors in district courts or before United States commissioners shall receive the following fees, except as otherwise expressly provided by law:

For actual attendance at the place of trial or hearing and for the time necessarily occupied in going to and from such place at the beginning and end of such service or at any time during the same, $20 per day, except that any juror required to attend more than thirty days in hearing one case may be paid in the discretion and upon the certification of the trial judge a per diem fee not exceeding $25 for each day in excess of thirty days he is required to hear such case.

For the distance necessarily traveled to and from a juror's residence by the shortest practicable route in going to and returning from the place of service at the beginning and at the end of the term of service 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges; and for additional necessary daily or other interim travel during the term of service the juror shall be allowed for such travel 10 cents per mile, plus the amount expended for tolls, for toll roads, for toll tunnels, and for toll bridges, but not to exceed the subsistence allowance which would have been paid him if he had remained at the place of holding court overnight or during temporary recess, and if daily travel appears impracticable, subsistence of $16 per day shall be allowed, including the time necessarily occupied in going to and returning from the place of attendance. Whenever in any case the jury is ordered to be kept together and not to separate, the cost of subsistence during such period shall be paid by the United States marshal upon the order of the court in lieu of the foregoing subsistence allowance.

Jury fees and travel and subsistence allowances provided by this section shall be paid by the United States marshal on the certificate of the clerk of the court, and in the case of jury fees in excess of $20 per diem, when allowed as hereinabove provided, on the certificate of the trial judge.

Grand and petit jurors in the district courts for the districts of Guam and the Canal Zone shall receive the same fees and allowances provided in this section for grand and petit jurors in other district courts of the United States.

II. 28 U.S.C. §1865(b)(1) (1972):

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

III. 28 U.S.C. § 1869(h) (1972):

(h) "juror qualification form" shall mean a form prescribed by the Administrative Office of the United States Courts and approved by the Judicial Conference of the United States, which shall elicit the name, address, age, race, occupation, education, length of residence within the judicial district, distance from residence to place of holding court, prior jury service, and citizenship of a potential juror, and whether he should be excused or exempted from jury service, has any physical or mental infirmity impairing his capacity to serve as juror, is able to read, write, speak, and understand the English language, has pending against him any charge for the commission of a State or Federal criminal offense punishable by imprisonment for more than one year, or has been convicted in any State or Federal court of record of a crime punishable by imprisonment for more than one year and has not had his civil rights restored by pardon or amnesty. The form shall request, but not require, any other information not inconsistent with the provisions of this title and required by the district court plan in the interests of the sound administration of justice. The form shall also elicit the sworn statement that his responses are true to the best of his knowledge. Notarization shall not be required. The form shall contain words clearly informing the person that the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service.

Supreme Court, U. S.
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No. 73-5993

In the Supreme Court of the United States

OCTOBER TERM, 1974

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,

LAWRENCE G. WALLACE,
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5993

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 27) is reported at 486 F.2d 922.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1973 (App. 35). A timely petition for rehearing was filed on November 14, 1973, and was denied by the court of appeals on November 26,

1973 (App. 36). The petition for a writ of certiorari was filed on December 27, 1973, and was granted on June 17, 1974 (App. 37).

The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

Sections 1861-1869 and 1871 of Title 28, United States Code, are set forth in the appendix to petitioner's brief.

QUESTION PRESENTED

The petition for a writ of certiorari was granted, limited to the following question:

1. Does the Jury Selection and Service Act of 1968, 28 U.S.C. 1861, *et seq.*, require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U.S.C. 1867(d) in support of a motion to quash and upon the presentation of a *prima facie* claim of constitutional dimension, *i.e.*, the systematic exclusion of Mexican-Americans from the jury array.

STATEMENT

Petitioner was indicted on October 26, 1972, by a federal grand jury in the District of Colorado for knowing and intentional distribution of lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841 (a)(1). On January 2, 1973, petitioner filed, *inter alia*, a Motion to Dismiss Indictment because of Denial of a Fair and Impartial Jury (App. 11-12) and Defendant's Motion to Inspect, Copy and Reproduce the Master Jury Wheel and Qualified Jury Wheel (App. 13-14).

The primary grounds alleged in the motion to dismiss were that the master lists for grand and petit juries were drawn from Colorado voter registration lists which "exclude in disproportionate numbers persons with Spanish surnames, students and blacks, thus violating 28 U.S.C. § 1962 [sic] and the defendant's rights under the Fifth and Sixth Amendments * * *" (App. 11) and that "the class of persons who actually served on the Grand Jury in question and will serve on the petit jury systematically excluded and will exclude those persons under the age of thirty five, with Spanish surnames, of the Negro race, and students, all in violation of 28 U.S.C. § 1862 and the defendant's rights under the Fifth and Sixth Amendments * * *" (App. 11-12).

Attached to petitioner's motion to inspect the records for the jury wheel was an affidavit in which petitioner's counsel recited certain evidence which had been adduced in a state court trial on November 8,

1972 (App. 15-16). That evidence, according to the affidavit, established that 5.34 percent of the population of Boulder County twenty-one years of age or older is Spanish surnamed, while the percentage of Spanish surnamed persons on the jury list in that case was 1.92. The district court, at a hearing held on January 23, 1973 (App. 17-25), denied both the motion to inspect [1] and the motion to dismiss without a written opinion.

Petitioner was convicted after a trial by jury. The judgment of conviction was affirmed by the court of appeals on November 1, 1973 (App. 27-34), and a petition for rehearing was denied (App. 36). The opinion of the court of appeals does not discuss the inspection of jury records or jury discrimination issues, except to say that the court found no merit in "appellant's other contentions" (App. 34).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question upon which the petition was granted is whether the Jury Selection and Service Act of 1968, U.S.C. 1861, *et seq.*, requires that a defendant be

[1] In denying petitioner's motion to inspect, the court stated (App. 24):

> If you want to look at the jury list some time, we will hire some extra help and you can come down and you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that those groups bear to the total population. We concede that.

given access to jury lists when he files a sworn statement in compliance with 28 U.S.C. 1867(d) and presents a *prima facie* claim of constitutional dimension. As so framed, the question must be answered in the affirmative since under even the most restrictive construction of the Act, access to jury lists must be provided if a defendant presents a *prima facie* constitutional claim. Under this formulation of the question, the only issue in the present case is whether petitioner has alleged a *prima facie* constitutional violation. It is our position that he has not.

Petitioner's jury claim, however, also presents related issues not fully articulated, but fairly comprised, in the question on which the petition was granted. The question as presently stated assumes a legal standard to be applied in determining when access to jury lists should be granted. In our view the formulation of that legal standard is a threshold issue to be decided. We suggest that the question may appropriately be recast as follows: (1) whether the right to inspect granted by the Act is unconditional, or is conditioned on a *prima facie* showing of noncompliance with the Act's selection procedure; (2) whether, if the right to inspect is unconditional, denial of that right is a material error in the absence of a *prima facie* claim of systematic exclusion; and (3) whether, if the error is not material in the absence of such a claim, petitioner has presented such a claim here.

We submit that the Act requires that a defendant be provided access to jury records as a matter of

right upon the timely filing of a motion to inspect. Thus, in our view the district court erred in denying such access to petitioner. The error could be held to be harmless, if, as some courts of appeals have indicated, the Act is directed only at the prevention of purposeful discrimination. Since petitioner has alleged only that use of the voting lists results in underrepresentation of certain categories of persons, his claim is insufficient under that standard.

In our view, however, the Act imposes affirmative obligations beyond the prevention of purposeful discrimination. Its language and legislative history both indicate that Congress required jury selection plans to be formulated to achieve the goal of selection from a cross section of the community. While we believe it unlikely that petitioner will be able to show that the use of voting lists resulted in underrepresentation of a magnitude sufficient to violate this statutory standard and thus to support his motion to dismiss, we nonetheless conclude that the district court's error requires that this case be remanded for consideration of petitioner's claim after he has been afforded an opportunity to inspect the jury lists.

I

THE DISTRICT COURT ERRED IN DENYING PETITIONER'S MOTION TO INSPECT THE MASTER AND QUALIFIED JURY LISTS

The district court's finding that petitioner had failed to present evidence sufficient to warrant granting his motion to dismiss is not subject to dispute

under this Court's limited grant of certiorari, and was in any event correct. We submit, however, that the court should have granted petitioner's motion to inspect the jury lists and deferred action on the motion to dismiss until petitioner had had an opportunity to evaluate the data contained in the lists.

The Act prescribes exclusive procedures for challenging compliance with its provisions. 28 U.S.C. 1867(e). A motion to dismiss the indictment on the ground of "substantial failure" to comply with the selection provisions of the Act must be filed before the beginning of the voir dire examination or within seven days after grounds therefor were or could have been discovered.[2] 28 U.S.C. 1867(a)-(c). Such a motion must be accompanied by "* * * sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act]

---

[2] Since the motion here was filed before voir dire, the only possible question of timeliness is whether it was filed within seven days after the defendant discovered, or could have discovered by the exercise of due diligence, the ground for the motion. In a sworn statement attached to his motion to inspect, petitioner recites, as the basis for his motion, evidence adduced at a state court hearing conducted on November 8, 1972. Although the inspection motion was not made until January 2, 1973, the motion was filed within seven days after the attorney who was counsel in the state court hearing assumed responsibility for defending petitioner (R., Vol. II, Crim. Docket Card 72-CR-352). While the statutory time limit of course does not depend upon the identity of counsel representing the moving party, the district court here has not found that either petitioner or his earlier counsel could have, by the exercise of due diligence, earlier discovered the evidence adduced at that unrelated state court hearing.

* * *." 28 U.S.C. 1867(d). Upon the filing of such a motion and sworn statement, the moving party is allowed to present in support of his motion, among other things, records and papers used in the selection process. *Ibid.*

Section 1867(f) governs the disclosure of records used in the jury selection process, and that Section expressly provides that "[t]he parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of [a motion to dismiss] * * *." Section 1867(f) on its face thus confers a right of access to jury records without any required showing by the requesting party, and this literal reading of the statute has been adopted by several courts of appeals. See, *e.g.*, *United States* v. *Beaty*, 465 F.2d 1376 (C.A. 9); *United States* v. *Tijerina*, 446 F.2d 675 (C.A. 10); see also *Mobley* v. *United States*, 379 F.2d 768 (C.A. 5).

Indeed, such an unqualified right of discovery appears to be necessary to the effective use of the challenge procedures specified in the Act (summarized above), and nothing in the Act's legislative history suggests that Congress intended that a party's right to inspect jury records be qualified in any manner.[8]

[8] A 1966 bill containing proposed amendments to the federal jury selection system contained a provision almost identical to 28 U.S.C. 1867(f). The legislative history of the 1966 bill indicated that parties would not automatically be given access to jury records, but rather, access would require production of evidence of noncompliance with the bill's substantive provisions. See H. Rep. No. 1678, 89th Cong., 2d Sess., pp. 20-21. The House Report referred to the need to prevent the use of inspection as a delaying tactic and the use of jury records for the purpose of jury tampering. The 1968 Act effectively prevents the use of inspection for delay because challenges to a jury selection plan must be made before the beginning of *voir dire*, and in any event within seven days after grounds for challenge were or could have been discovered. 28 U.S.C. 1867(a).

Inspection of jury records will not, in our view, present a substantial risk that the records will be used for tampering purposes since the number of names appearing on the master and qualified lists will, as a practical matter, effectively preclude such use. Moreover, to the extent that the possibility of tampering is a matter of concern, the district court can properly enter a protective order restricting access to the lists to counsel. See *United States* v. *Beaty*, *supra*.

A contrary conclusion has been reached only by construing 28 U.S.C. 1867(d) as a limitation on the right of inspection accorded by Section 1867(f) —that is, by requiring the filing of a Section 1867(d) sworn statement as a precondition to the right to inspect. See, *e.g.*, *United States* v. *Grey*, 355 F. Supp. 529 (W.D. Okla.). That construction, which would require a party to establish a basis for a noncompliance claim before being given access to the necessary evidence, is contrary to the plain language of Section 1867(f), which permits inspection in the "preparation" of a motion to dismiss.

In our view, the language and structure of the Act indicate that Congress intended the challenge procedures of Section 1867 to operate in the following manner: Upon the filing of a timely request, parties are to be accorded the right to inspect jury records. If the inspection discloses facts which a party be-

lieves support a claim of non-compliance with the Act, those facts should be set forth in a sworn statement accompanying a motion to dismiss. If proof of the facts alleged would be substantial evidence of noncompliance, the district court should then hold a hearing at which relevant evidence, including jury records, could be presented. Accordingly, we submit that the Act provides an unqualified right of inspection of jury records and that the district court therefore erred in denying petitioner's request for inspection.[4]

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[4] If, contrary to our submission, the Act is interpreted to require the defendant to present evidence of substantial noncompliance with the Act before he is allowed to inspect the records, petitioner's submission was insufficient. The affidavit submitted recited underrepresentation of Spanish surnamed individuals and young people in Boulder County (App. 15-16). But Boulder County is one of 23 counties in the Denver Division of the District (App. 2) and contains only 8.7 percent of the Division's population and only 5.9 percent of the population for the District. United States Department of Commerce, Bureau of Census, 1970 Census of Population: General Population Characteristics, Advance Report, Colorado. The master jury wheel for the petit jury for the present case was drawn from the Denver Division (App. 3-4). The members of the grand jury were selected from the wheels of each of the three divisions within the entire district (App. 2-8). Thus, the allegations were not sufficiently significant to constitute substantial evidence of a failure to comply with the Act within either the entire judicial district or the Denver Division.

II

THE DISTRICT COURT'S ERROR IN REFUSING TO ALLOW INSPECTION OF JURY RECORDS WAS MATERIAL

The materiality of the district court's error should be determined in light of petitioner's particular claim of noncompliance with the Act. Thus, the specific question to be resolved in this case is whether Congress intended that lists of actual or registered voters be accorded conclusive validity as a source of names for jury service in the absence of a history or present practice of electoral discrimination in the district or division where the jury selection plan is challenged.

The Act explicitly requires that federal jury selection plans provide for random selection as the means, and for the use of actual or registered voter lists as a source, for jury selection. 28 U.S.C. 1863. While voter lists are thus the required primary source for jurors, the Act also specifies (28 U.S.C. 1863(b)(2)) that "[t]he plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of [the Act]." Section 1861 provides that juries are to be "selected at random from a fair cross section of the community * * *", and Section 1862 declares that no citizen shall be excluded from jury service "* * * on account of race, color, religion, sex, national origin, or economic status."

Petitioner's claim is that the use of voter lists results in a degree of underrepresentation [5] of certain groups (blacks, persons with Spanish surnames, persons between the age of 21 and 35, and students) sufficient to require resort to supplementary sources. Petitioner does not contend that jury lists are complied in a discriminatory fashion; nor does he contend that there is a history or present practice of electoral discrimination against these groups in Colorado.

The courts of appeals for the Ninth and Second Circuits have ruled, in effect, that voter lists need not be supplemented under the Act unless there is a showing that the groups alleged to be underrepresented were the subject of electoral discrimination within the district where the jury selection plan is at issue. See, *e.g.*, *United States* v. *Guzman*, 468 F.2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937; *United States* v. *James*, 453 F.2d 27 (C.A. 9); *United States* v. *Bennett*, 445 F.2d 638 (C.A. 9), certiorari denied, 404 U.S. 1023; *United States* v. *Parker*, 428 F.2d 488 (C.A. 9), certiorari denied, 400 U.S. 910.

The above decisions are based on the premise that a defendant must establish systematic exclusion of a cognizable class in order to challenge successfully

[5] Underrepresentation refers to the disparity between the percentage of members of a cognizable class (*e.g.*, blacks, Spanish surnamed persons) on the jury list and the percentage of members of the class in the voting age population.

a jury selection plan.[6] In effect, these decisions have adopted the standards of this Court's Sixth Amendment opinions (*e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545; *Hernandez* v. *Texas*, 347 U.S. 475) as controlling under the Act. If this view is correct, then the failure to allow inspection of the lists here was not a material error in the absence of a showing, or even an allegation, by petitioner of past or present voter discrimination in Colorado. We believe, however, that the Act created broader rights than those established under Sixth Amendment principles, and, specifically, that substantial underrepresentation of a cognizable group (such as blacks or Mexican-Americans) would necessitate resort to supplementary sources under Section 1863 (if it has a substantial

[6] This premise is explicit in the Ninth Circuit decisions, and, although not expressly referred to in *United States* v. *Guzman*, *supra*, it is an underpinning of that decision. We note, however, that subsequent decisions of the Second Circuit suggest that the decision in *Guzman* was, in large part, attributable to the court of appeals' doubts as to whether the groups in issue (age groups) constituted cognizable classes for purposes of the Act. See *United States* v. *Jenkins*, *infra*, 496 F.2d 57 (C.A. 2), petitions for writs of certiorari pending, Nos. 73-6639, 73-6826, and 73-6903; *United States* v. *Fernandez*, *infra*, 480 F.2d 726 (C.A. 2).

In *United States* v. *Dangler*, 422 F.2d 344 (C.A. 5), the court of appeals suggested that while unsupplemented voter lists might not be conclusively valid as the source of jurors even in the absence of electoral discrimination, persons who choose not to register are not a cognizable group for purposes of the Act. This suggestion was made in response to a contention that the use of voter lists resulted in underrepresentation of members of the Jehovah's Witness sect because such persons do not register as a matter of conscience.

impact on selection of jurors, see pp. 16-18, *infra*) even though no history of voter discrimination against the group is proved.[7] As the court of appeals stated in *United States* v. *Fernandez*, 480 F.2d 726, 733 (C.A. 2):

> * * * [T]he * * * Act goes beyond prohibition of "intentional" distortions and provides that in certain cases affirmative measures must be undertaken to insure that "juries [are] selected at random from a fair cross section of the community * * *."

See also *United States* v. *Jenkins*, 496 F.2d 57 (C.A. 2), petitions for writs of certiorari pending, Nos. 73-6639, 73-6826, and 73-6903.

Indeed, it is difficult to see how the Act would admit of any other construction. As noted earlier, Section 1863 expressly provides that the use of supplementary sources is required where necessary to foster not only the non-discrimination policy of Section 1862, but also the policy of Section 1861 that juries be selected from a fair cross section of the community. A holding that the use of supplementary sources is required only when there is evidence of past or present electoral discrimination would thus be contrary to the plain language of the Act.

---

[7] This is not to say that patterns of discrimination are irrelevant in challenges to plans under the Act. For example, it is entirely possible that proof of the existence of past or present patterns of electoral discrimination might mean that a party need show a lesser degree of underrepresentation in order successfully to challenge a jury selection plan.

The legislative history confirms the correctness of our construction of the Act. The House Report specifically states that voter lists are to be supplemented "* * * whenever they do not adequately reflect a cross section of the community." H. Rep. No. 1076, 90th Cong., 2d Sess., p. 4. And the policy basis for this requirement is explained in the House Report as follows (*id.* at 8):

> Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.

See also S. Rep. No. 891, 90th Cong., 1st Sess.; 114 Cong. Rec. 3992 (remarks of Rep. McCulloch).

In short, Congress intended that voter lists be supplemented by other sources where the use of voter lists results in substantial failure to achieve the cross sectional goal of Section 1861. Since, on this record, it is not possible to know the degree of underrepresentation, if any, of various groups on Colorado's voting lists, and thus the possible deviation of Colorado federal juries from the community cross section, we believe that petitioner was entitled to inspect the jury lists.

That is not to suggest, however, that he is likely to prevail in his challenge to the selection plan. While voter lists will almost inevitably involve some degree of underrepresentation of certain groups, they remain the best "cross-sectional list of the nonracial classes." Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 Mercer L. Rev. 349, 368 (1969). Whether voter lists also adequately reflect the racial groups in the community depends in large part on whether there is a history of electoral discrimination and on the efficacy of remedial legislation such as the Voting Rights Act of 1965. Here, where it is not alleged that patterns of discrimination have existed in Colorado, petitioner must, in our view, demonstrate a greater degree of underrepresentation than would be required where there is evidence of patterns of discrimination.[8]

A "fair" cross section need not be a mathematically precise cross section. Congress specifically did not intend to require either mathematical precision or proportional representation in jury selection. As the House Report explained (H. Rep. No. 1076, *supra*, at 5):

[8] Petitioner must, of course, show that the groups which are claimed to be underrepresented are cognizable classes for purposes of the Jury Selection Act. There is a substantial question whether persons under age 35 and students constitute such classes, since they are not referred to in the Act. See 28 U.S.C. 1862; *United States* v. *Kuhn*, 441 F.2d 179 (C.A. 5). But see *United States* v. *Butera*, 420 F.2d 564 (C.A. 1); *Hamling* v. *United States*, No. 73-507, decided June 24, 1974.

> The voting list need not perfectly mirror the percentage structure of the community. But any substantial percentage deviations must be corrected by the use of supplemental sources. Your committee would leave the definition of "substantial" to the process of judicial decision.

The Act contains no guidelines as to what constitutes "substantial" deviation, but the rejection of a mechanical "percentage structure" requirement suggests that substantial deviation should be determined by analysis of the practical impact of the underrepresentation rather than by focusing simply on the magnitude of the deviation.

In our view the proper approach to determination of the significance of the underrepresentation resulting from the use of voter lists is that employed by the court of appeals in *United States* v. *Jenkins*, *supra*. *Jenkins* involved a claim that the use of voter lists resulted in substantial underrepresentation of blacks on the jury lists in the New Haven Division of the District of Connecticut. The defendants contended that the sole measure of substantial deviation from the cross sectional goal was the ratio of the black percentage of the adult population to the black percentage of the adults available for jury service. The record revealed that this ratio was 5 to 3, or, stated differently, that the use of voter lists resulted in a 40 percent underrepresentation of blacks on the jury lists.

The court of appeals rejected the contention that the ratio was the sole test of whether the deviation

from the cross sectional goal was permissible. The court noted that while the ratio appeared substantial, in fact it had an insubstantial impact if analyzed in terms of "* * * the difference that would result in the absolute racial composition of the venire as a result of the underregistration of blacks as voters" (496 F. 2d at 65). In *Jenkins* correction of the underrepresentation would have added only one additional black to an average array of 50 to 60 veniremen. Holding that "[t]he test of fairness intended by Congress is the more practical one of the difference in absolute numbers rather than a difference in percentages" (496 F.2d at 66), the court of appeals concluded that the difference of one black in a panel of 50 to 60 jurors was not substantial. See our memorandum in opposition in *Hall* v. *United States*, petition for a writ of certiorari pending, No. 74-6639 (a copy of which is being served on petitioner).

Here, however, petitioner was deprived of an opportunity to develop the requisite facts bearing on his contention that the grand jury which indicted him and the petit jury which was to try him were not selected in accordance with the Act's requirements. We conclude, therefore, that the case should be remanded to the court of appeals with instructions that petitioner's motion challenging the array be considered by the district court, after petitioner has been afforded an opportunity to inspect the jury lists. See *United States* v. *Beaty*, *supra*.

III

PETITIONER FAILED TO MAKE A SUFFICIENT CLAIM OF A CONSTITUTIONAL VIOLATION TO WARRANT HIS BEING GRANTED, ON THAT BASIS, DISCOVERY OF JURY SELECTION RECORDS AND AN EVIDENTIARY HEARING

If this Court agrees with our construction of the Jury Selection and Service Act of 1968, it is unnecessary to consider the constitutional questions which petitioner now raises. Indeed, in our view, as a result of the requirements of the Act, constitutional claims will rarely be encountered in the context of federal jury selection.* As this Court has repeatedly held, the Constitution requires no more than that jury selection be free of purposeful discrimination. See, *e.g.*, *Whitus* v. *Georgia*, 385 U.S. 545; *Swain* v. *Alabama*, 380 U.S. 202. Absent systematic exclusion, "[t]he mere fact of inequality in the number selected does not in itself show discrimination." *Akins* v. *Texas*, 325 U.S. 398, 403.

The Act, including both the cross sectional and nondiscrimination of Sections 1861, 1862 and 1863 assures that the constitutional standard will be satisfied in federal jury selection. Petitioner's suggestion that

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*28 U.S.C. 1867(e) provides that the challenge procedures established by the Act shall be exclusive but that nothing shall prevent a party from pursuing any remedy which may be available for enforcement of any law prohibiting discrimination in jury selection. This provision has been interpreted to permit a party who made an untimely challenge under the Act nevertheless to present a claim based on constitutional grounds. See, *e.g.*, *United States* v. *DeAlba-Conrado*, 481 F.2d 1266 (C.A. 5).

underrepresentation resulting from the use of voter lists as the sole source of prospective jurors rises to the level of a constitutional violation is without merit. In the absence of an allegation of a past or present pattern of electoral discrimination, and in the absence of an allegation of violation of the random selection principle, deficiencies resulting from the use of voter lists as a source for jurors are statutory and not constitutional. Since petitioner has not made such allegations, his claim of underrepresentation fails, as a matter of law, to present a *prima facie* constitutional question.

CONCLUSION

For the foregoing reasons, the case should be remanded to the court of appeals with instructions that it be remanded to the district court for consideration of petitioner's motion challenging the array after petitioner has been afforded an opportunity to inspect the jury lists.

Respectfully submitted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEET, *Petitioner,*

VS.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF
and
BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-5993

JOHN E. TEST, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in this case to consent to filing the attached brief *amicus curiae* out of time. Petitioner as well as respondent have granted their consent to MALDEF's filing the attached brief out of time.[1]

MALDEF was established on May 1, 1968, as a non-profit corporation incorporated under the laws of

[1]The letters of consent have been filed with the Clerk.

the State of Texas, primarily to provide legal assistance to Mexican Americans (Chicanos).[2] In its efforts to assist the Mexican American community achieve its rights under the law, MALDEF has been involved in litigation which has challenged the tradtional barriers facing Mexican Americans: abridgement of participatory, constitutional, and political rights; unequal educational opportunities; discriminatory employment practices; unequal distribution of public services; and law enforcement misconduct.

Courts have long recognized that Chicanos constitute a separate, identifiable ethnic group which historically has been subjected to pervasive patterns of illegal discrimination in our society. E.g., *Hernandez v. Texas*, 347 U.S. 475 (1954). One federal district court recently assessed the obstacles confronting the Mexican Americans in Texas who are represented by MALDEF.

> Because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican American . . . has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

[2]Currently the word Chicano is used interchangeably with the term Mexican American. The term Spanish-surnamed is generally more comprehensive.

Graves v. Barnes, 343 F.Supp. 704 (W.D. Texas, 1972), *rev'd in part, aff'd in part, sub nom. White v. Register*, 412 U.S. 755 (1973). See also *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973); *Montoya v. People*, 141 Colo. 9, 345 P.2d 1062 (1959).

The questions presented in the instant case go to the heart of the fair administration of the criminal justice system in the federal courts. These questions most immediately concern the criminal defendant's statutory and constitutional rights of access to jury records which must, of necessity, provide the basis for any successful jury challenge. More fundamentally, the Court is called upon to give point to the basic rights guaranteed by the Constitution of the United States and the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §1861 *et seq.* [hereinafter referred to as "Act"]: the defendant's right to grand and petit juries selected at random from a fair cross-section of the community; and the right of all qualified persons to be afforded the opportunity to be considered for jury service. The defendant who is presently before the Court, and thousands of others, unlawfully continue to be denied both the benefit of these rights and the judicial means by which to vindicate them.

The Mexican American community is one of the groups hardest hit by the continuing inequities of the grand jury system, both Federal and State. The United States Commission of Civil Rights has found, for example, significant and widespread underrepre-

sentation of Mexican Americans on grand and petit juries throughout the Southwest.[3] The Commission determined that factors such as low income status and English language deficiencies did not explain the wide disparity between the proportion of Mexican Americans in the total population and their proportional representation on juries. Rather, the disparities were charged directly to the officials empowered to select juries. These officers were found to have abused their overbroad discretion both by actively excluding Mexican Americans from the jury lists and by failing to take affirmative steps to obtain a truly representative cross-section of the community for jury service.[4]

Substantial underrepresentation of Spanish surnamed citizens equally characterizes the federal jury system, despite the advances made in the statutory framework.[5] Indeed, the district judge in the instant case openly conceded that Blacks and Spanish-surnamed persons were underrepresented on the very jury lists he refused to open to scrutiny. (R 17.)

The continuing enormity of the problem recently was articulated by one Federal district court judge, *United States v. Burkett*, 342 F.Supp. 1264 (D. Mass. 1972), whose judicial district typically utilized only

[3]United States Commission on Civil Rights, *Report on Mexican Americans and the Administration of Justice in the Southwest, A Study of Grand Jury Service by Persons of Spanish Surname and by Indians in Selected California Counties* (1970). [Hereinafter cited as "US Commission on Civil Rights Report."] See also, *Oregon v. Mitchell*, 400 US 112, 132 (1970).

[4]U.S. Commission on Civil Rights Report, *supra*, at p. 46, 88.

[5]Compare, The Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* with its predecessor, 71 Stat. 638, Sept. 9, 1957.

voter registration lists in formulating its entire juror pool.[6]

> A jury selection system which is fundamentally based upon voters' registration lists in a state in which no one is required to register for voting, and in which it is obvious to anyone who scans the voters' registration lists that the black, those of Oriental origin, those with Spanish surnames, women, young persons, and poor and deprived persons generally tend not to register to vote, in proportions related to their number in the citizenry, . . . is a jury system which raised constitutional problems of serious import.
>
> * * *
>
> Any person familiar in the slightest degree with the grand and petit juries in this district is aware that the use of the Massachusetts voting lists . . . and the policy of excusing affluent and educated persons from jury duty have produced juries predominantly white, lower-middle class, and middle-aged . . . The effect of that apparently purposeful emphasis in prejudicing young defendants, victims of denials of civil rights, persons from non-white races, and others needs no elaboration. Here participatory democracy is a sham.
>
> * * *
>
> What is in challenge is the whole system of justice in America.

342 F.Supp. at 1264-66.

[6]Since the passage of the 1968 Act, almost all federal judicial districts use voter registration lists or actual voter lists as their sole source of potential jurors. See, Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis and a Case Study*, 10 Amer. Crim. Law Rev. 771, 797 (1972). See also, *United States v. Butera*, 420 F. 2d 564 (1st Cir., 1970).

The nationwide expression of this underrepresentation of Spanish-surnamed citizens is manifest in the statistics recently compiled by the Bureau of Census with regard to the 1972 national election.[7] The Bureau found that less than half of all Spanish surnamed citizens of voting age reported themselves to be registered voters, while little more than a third were reportedly actual voters.[8] The failure of Mexican Americans to play an active role in the electoral process has been historically documented as the result of legislative obstacles. Among the most severe of the inhibitions to voting was the requirement of literacy tests, now unconstitutional. Other obstacles to voting included the poll tax and cumulative poll tax, which was overruled in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); residency requirements ruled illegal in *Dunn v. Blumstein,* 405 U.S. 330 (1972); and the requirement of annual registration overruled in *Beare v. Smith,* 321 F.Supp. 1100 (W.D. Tex., 1971), *aff'd,* ..... F.2d ..... (5th Cir. No. 71-1924; July 31, 1974). Although many of these obstacles to voting no longer confront Mexican Americans, the situation has not appreciably improved. A study conducted by the League of Women Voters Education Fund recognized that among the contributions to disenfranchisement of minorities were the proce-

[7]Census counts themselves have been found to substantially undercount Mexican Americans and other minorities. *Confederacion de la Raza Unida v. Brown,* 345 F.Supp. 909 (N.D. Cal. 1972).

[8]U.S. Bureau of Census, *Current Population Reports,* Series P-20, No. 253, "Voting and Registration in the Election of November 1972", pp. 17-18, 22-23. See also, Kairys, David, *Jury Selection: A Mathematical Method,* 10 Amer. Crim. Law Review 771.

dures employed by voting administrators. According to this study, election officials have never been required to take affirmative steps to encourage people to vote. Furthermore, they have never been required to adopt practices to increase voting convenience. The study noted that 38% of all polling places observed were not clearly marked, 58% of the surveyed polling places lacked convenient public transportation, and 89% of the local voter officials in the communities observed did not publish a voter information guide.[9]

Whatever its cause, this underrepresentation of Mexican Americans on voter lists, and hence on juror lists which are based solely upon voter lists, has serious and legally intolerable consequences. First, the absence of minority grand jurors heightens the risk that prejudice will affect grand jury actions. This, of course, is the fundamental reason for the constitutional and statutory protections to assume fair selection.[10] Secondly, as noted by one legal commentator:

> Selection as a grand or petit juror presents the sole opportunity for the average citizen to actively participate in the administration of government. Jury service is a fundamental prerogative of citizenship. The opportunity to participate in government through service as a grand or petit juror has been found to be one of pro-

[9]Williams, *Voting Barriers: Strategies for Removing Obstacles to the Black Ballot,* 2 Black Law Journal 164, 165 (1972).

[10]See, Comment, *Voter Registration Lists: Do They Yield A Jury Representative of the Community?* 5 U. of Mich. J. of Law Reform 385 (1972). [Hereinafter referred to as Michigan *Comment.*]

> found psychological importance to minority persons. Studies have shown that minority groups are more likely to feel they belong to the community and society if they are available or called as jurors. Such involvement has a profound impact on their attitude toward law and the system of justice in this country. However, since minorities are continuously excluded or greatly underrepresented, their confidence and trust in government deteriorates, while, as "legal outcasts", their sense of inferiority and alienation grows.[11]

In fact, a desire to eliminate this growing isolation of minority groups from the process of government underlay in large part the action of Congress in enacting the Jury Selections and Service Act of 1968. As noted by former Attorney General Ramsey Clark in 1967:

> While the present system appears not to have operated unconstitutionally, in some districts Negro representation on juries has been substantially less than the proportion of Negroes in the

[11]Edward A. Villalobos, *Grand Jury Discrimination And The Mexican American*, 5 Loyola of Los Angeles L.R. 87, 121 (1972); See, Broeder, *The Negro in Court*, 1965 Duke L.J. 19, 26; United States Commission on Civil Rights Report at 113, 114. See also, Michigan *Comment* at p. 389; Statement of Lawrence Speiser, Director of National Capital Area American Civil Liberties Union, Federal Jury Selection, Hearings Before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, U.S. Senate, 90th Congress, 1st Session, p. 334, wherein he states with reference to the sole use of voter registration lists that this practice "Narrow[s] the base of jury selection and in so doing cast[s] aside the persuasive evidence that jury service is a powerful means of education in the democratic process, even for those previously apathetic about their civil responsibilities; Gwein, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit*, 20 Mercer L.R. 349 (1969).

> community and other classes have sometimes been inadequately represented on juries. Where such disparities occur they create an impression of unfairness in the judicial system of the United States—an impression which should be scrupulously avoided if we are to foster respect for the rule of law.

113 Cong. Rec. 3954, 3955. (Letter of Attorney General Clark (1967). See also, *Peters v. Kiff*, 402 U.S. 493, 502-03 (1972).

Exclusion of Mexican Americans from grand juries adversely affects the Mexican American community's ability to call government agencies and officials to account for their actions or inactions. For example, "A Study of Grand Jury Service By Persons of Spanish Surname and By Indians in Selected California Counties," conducted by the California Rural Legal Assistance Foundation found that:

> [In] California, grand juries have the authority both to indict persons for crimes and to investigate and evaluate the administration of local government. Because of this broad authority, exclusion of Mexican Americans from grand juries not only may affect their ability to receive fair and impartial criminal justice but is also likely to render grand juries less vigorous in inquiring into and exposing governmental deficiencies . . . adversely affecting Mexican Americans.[12]

The virtually universal exclusion of Chicanos from participation in the federal judicial system except as

[12]U.S. Commission on Civil Rights Report, at 39.

parties-defendant, is particularly damaging in view of the long history of discriminatory law enforcement which has plagued Chicanos throughout the Southwest.[13] This pervasive pattern of discrimination and harassment is facilitated and compounded by subsequent exclusion of Chicanos at the indictment and trial stages of Federal prosecutions.

MALDEF has litigated numerous suits attacking discriminatory and illegal practices of municipal, state, and federal government officials which affect the lives and liberties of Mexican Americans and other minorities. With few exceptions, these challenges have been based upon the irreconcilability of such practices with the purpose and spirit of the Constitution, and upon the affirmative remedies afforded by Congress under the Civil Rights Acts and other statutes. Since the decision of the Court in this case may affect the scope of the Federal Jury Service and Selection Act of 1968, 28 U.S.C. §1861 *et seq.*, MALDEF deems it important to bring to the Court's

[13]See, e.g., Committee on Labor and Public Welfare United States Senate, *The Migratory Farm Labor Problem in the United States*, 40-41 (1968); L. Grebler, J. W. Moore, and R. C. Guzman, *The Mexican American People: The Nation's Second Largest Minority* 532 (1970); A.B.C. Rendon, *Chicano Manifesto: The History and Aspiration of the Second Largest Minority in America*, 220 (Collier 1972); R. Acuna, *Occupied America. The Chicano's Struggle Toward Liberation* 41 (Canfield 1972); S. Steiner, *La Raza: The Mexican Americans* (Harper Colophon 1970). See also, *Hearings on Relations Between the Police and Mexican Americans Before the California Assembly Committee on the Administration of Justice* (1972); A. Morales, *Ando Sangrado . . . I Am Bleeding* (Perspectiva 1972); *Police-Community Relations in East Los Angeles, California: A Report of the California State Advisory Committee to the United States Commission on Civil Rights* (1970).

attention some implications of the significant issues here presented by respectfully praying leave to file a brief *amicus curiae*, out of time, in support of petitioner's brief.

Dated: September 6, 1974.

Respectfully submitted,

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OCTOBER TERM 1973

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JOHN E. TEST, *Petitioner,*

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The interest of the Amicus Curiae is set forth in the foregoing motion.

ARGUMENT

Amicus Curiae respectfully urges that the decision below be reversed. The clear provisions of the Act and the relevant case law establish that petitioner was entitled to access to pertinent jury records if he made

an appropriate timely motion pursuant to 28 U.S.C. § 1867, accompanied by a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of the Jury Selection and Service Act of 1968", [The Act] 28 U.S.C. § 1867 (a), (d), and (f). *United States v. DeAlba-Conrado,* 481 F. 2d 1266 (5th Cir. 1973); *United States v. Guzman,* 468 F. 2d 1245, 1246 (2nd Cir. 1972); *United States v. James,* 453 F. 2d 29 (9th Cir. 1971)[14]

The first question, then, becomes whether petitioner's showing of significant underrepresentation of Mexican Americans on the jury lists, if true, constitutes a violation of his rights under the Act. *Amicus* agrees with both the Solicitor General[15] and petitioner[16] herein that the Act clearly imposes an affirmative obligation upon jury selection officials to obtain a jury pool drawn from a fair cross-section of the community, by whatever means necessary; and that petitioner's allegations of underrepresentation establish, on their face, a clear violation of that duty, and

[14]Several courts, including the Tenth Circuit, either: (1) have found that the filing of the sworn statement is not necessary to trigger the provisions of § 1867(f), but rather that access to the documents must be permitted as of right, for the *preparation,* as well as the presentation of a motion under § 1867(a). *United States v. Beaty,* 465 F. 2d 1376, 1381-82 (9th Cir. 1972); *United States v. Tijerina,* 446 F. 2d 678, 680 n. 5 (10th Cir. 1971); or (2) have waived the requirement for the statement under certain circumstances, *United States v. Ware,* 473 F. 2d 530 (9th Cir., 1973). See also, *Mobley v. United States,* 379 F. 2d 768, 773 (5th Cir., 1967) (pre-Act discovery of jury questionnaires improperly denied by trial judge). In the case at bar the requirement for the filing of a sworn statement, if any, was met.

[15]Memorandum of the United States, pp. 9-10.

[16]Brief for the petitioner, pp. 33-38.

hence of the Act. Petitioner, therefore, was entitled to inspection of jury records essential to the proof of his claim. 28 U.S.C. § 1867 (a), (d), and (f).

Even assuming *arguendo* that the Act lacks a requirement of affirmative action, and that a violation of the Act must be proven by evidence of the so-called "systematic exclusion" of an identifiable group from the juror pool, petitioner's allegations establish a *prima facie* case of statutory violation. This showing of exclusion need not be accompanied by direct proof of discriminatory intent or bad faith on the part of jury selection or other officials. Rather, this intent may be inferred from a showing of persistent and substantial disparity between the proportion of the excluded group in the jury pool and the proportion of the group in the population. Under the Act, petitioner's allegations, if proven, shift the burden of proof to the government to justify the disparity.[17]

[17]Some courts have taken the position that, despite the failure of Congress to so state, the Act *sub silentio* sanctions admitted failure to meet its cross-sectional goal where such failure is unattributable to intentional discrimination. Cf., *Parker v. United States,* 428 F. 2d 675 (10th Cir. 1971). According to this argument, even admitted and persistent underrepresentation of an identifiable group in juror pools drawn from voter lists does *not* constitute a violation of the Act, unless the discrepancy is shown to be the product of active discrimination by the state in the actual registration or voting process. The upshot of the argument is that, in alleging purportedly fortuitous underrepresentation of a group on the voting lists, a defendant has no right of access, under the Act, to jury records, or to a hearing on the allegations of underrepresentation. This reasoning, taken to its logical extreme, bars a challenge of this nature regardless of the degree of underrepresentation alleged. The argument is patently invalid on at least three levels. First, as shown, it runs counter to, and effectively vitiates the express provisions and intent of the Act. Secondly, it grafts onto the Act a requirement for elements of proof in excess of those required to prove a constitutional violation. Were the

Petitioner's allegations of underrepresentation further establish a *prima facie* case of a constitutional violation which alone is sufficient to require the granting of the petitioner's motions for access to records and for a hearing on his contentions. Lastly, even were petitioner's allegations insufficient under either the statute or the Constitution, this Court should exercise its supervisory power over the federal courts to facilitate the defendant's access to information which might well provide the basis for a cognizable jury challenge.

I. UNDER THE CONTROLLING STATUTE AND THE CONSTITUTION, PETITIONER WAS ENTITLED TO ACCESS TO JURY RECORDS UPON THE TIMELY FILING OF AN APPROPRIATE MOTION AND AFFIDAVIT PURSUANT TO 28 U.S.C. § 1867 (a), ALLEGING SUBSTANTIAL UNDERREPRESENTATION OF MEXICAN AMERICANS ON THE JURY LISTS.

A. Petitioner's Showing of Substantial Underrepresentation of Mexican Americans in the Jury Pool, If True, Establishes the Failure of Jury Selection Officials to Comply With Their Affirmative Statutory Duty to Formulate and Utilize a Jury Plan Productive of a Jury Pool Drawn From a Fair Cross Section of the Community.

As extensively documented in petitioner's brief, (Brief of Petitioner, p. 33), the legislative history of the Act clearly establishes that Congress imposed an affirmative duty upon jury selection officials to supplement the initial juror pool where necessary to

Act to so require, it would illegally diminish the rights it was intended to protect and implement. Third, the practical result is untenable, in that, under this formulation, substantially all federal jury selection plans would be immune from attack under the Act, no matter how egregious the underrepresentation of racial and other classes on the voter (and hence jury) lists.

achieve the cross sectional objectives of §§1861 and 1862 of the Act. Cf. 28 U.S.C. § 1863 (b) (2). Central to Congress' concerns in drafting the legislation was the need to inspire public confidence in the jury system.[18] As stated by Congressman Charles Mathias:

> Certainly, if people have some doubt that they can get absolutely impartial justice, and if they have any question about the administration of justice, then properly I think they would have a lack of confidence in the basic institutions of our government.
>
> * * *
>
> This bill removes the question of confidence in the judicial system. It insures that there will no longer be any juries composed of an elite, but that every man, *in fact*, will be judged by his peers, by his equals. This is the thrust and this is the essence of the bill.

144 Cong. Rec. 3993 (1968) (emphasis added).

There can be no doubt that Congress had the power to impose affirmative obligations upon federal jury selection officials in the exercise of its power to guarantee non-discrimination in grand and petit juries.[19]

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[18]The congressional concern in drafting legislation which would foster respect on the law is reflected in numerous provisions of the Act, among them: §1863(b)(4) which provides for flexibility in the number of names in the master jury wheel as well as periodic refilling of the wheel, and §1863(a) which provides a flexible plan for each district. See Brief of the Petitioner, pp. 32, 33.

[19]The defendant's right to a jury drawn from a fair cross-section of the community first was held to arise under the Fourteenth Amendment's equal protection guarantee in 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880); see *Smith v. Texas*, 311 U.S. 28 (1940). This right was extended to all federal litigants pursuant to the Court's exercise of its statutory power over the federal courts, *Glasser v. United States*, 315 U.S. 60 (1942);

Cf. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *Katzenbach v. Morgan,* 384 U.S. 641 (1966); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Oregon v. Mitchell,* 400 U.S. 112 (1970). As noted in the legislative history of the Act, Congress had before it extensive evidence of the substantial and chronic failure of pre-Act juror selection systems to produce a fair cross-section of the community. (See Brief of Petitioner, pp. 18-22, 24-27.) Confronted with overwhelming evidence indicating the need for comprehensive legislation to enforce the basic rights at stake, "The choice of appropriate remedies [was] for Congress and the range of available ones [was] wide." *Oregon v. Mitchell, supra,* 400 U.S. at 147, (Douglas, J. concurring).

In imposing the affirmative action requirement in the Act, the Congress was implementing a concept which long before had appeared in the decisions of this Court. The idea that jury selection officials have an affirmative obligation to draw from all identifiable groups in the community was first articulated by the Court in *Smith v. Texas,* 311 U.S. 128 (1940). In finding that the statistics in evidence established a constitutional violation, the Court stated:

> What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946), and, finally, in 1972, to all state *and* federal litigants pursuant to the due process clauses of the Fifth and Fourteenth Amendments, *Peters v. Kiff,* 407 U.S. 493 (1972). This Court has also held the right to arise out of the Sixth Amendment right to jury trial. *Williams v. Florida,* 399 U.S. 78 (1970).

> whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

311 U.S. at 132. Accord: *Hill v. Texas,* 316 U.S. 400 (1942).

In the later case of *Cassell v. Texas,* 339 U.S. 282 (1950), the Court clearly restated and amplified the affirmative action requirement. The Court held that:

> Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service.

339 U.S. at 289, quoting *Hill v. Texas, supra,* 316 U.S. at 404.

Thus, if a jury selection system is based upon a procedure which by intention or by fortuity operates to exclude large numbers of minority or other persons, jury officials have the affirmative obligation to "seek to learn" whether there are members of this excluded class who are qualified in fact for jury service. See, *Davis v. Davis,* 361 F. 2d 770 (5th Cir. 1966); *Mobley v. United States,* 379 F. 2d 768, 772 (5th Cir. 1967). This duty is binding on jury officials regardless of whether the initial source of the jury pool is selected under a "key man" or a voter list system.

Congress left no doubt in the provisions of the 1968 statute that the voter list system is not immune from this affirmative action requirement. To the contrary, § 1863 (b) (2) clearly states that:

> The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title.

Thus in designating voter lists as the initial source for the federal juror pool, Congress did not intend that the cross-sectional goal be frustrated by either the intended or fortuitous failure of these lists to provide the requisite cross-sectional pool; nor did Congress permit such a result.[20] As noted by one of the most foremost experts in the area of federal procedure:

> Indeed the subsection 1863 (b) (2) provides that the plan *shall* provide a supplemental source of names in addition to voter lists when necessary to further the policy of the chapter, a provision included, undoubtedly, to avoid frustration of the fair cross-section policy in areas in which registration among certain racial or economic classes is below average.

5A J.Moore, *Federal Practice*, ¶ 47.05 n.2, p. 2022 (emphasis in original).

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[20]The Solicitor General has concurred in this interpretation, stating in his Memorandum that:

> . . . [W]hen Congress required that juries be selected from a "cross section of the community," it intended that federal jury selection plans be affirmatively formulated to achieve that goal and not merely to avoid discriminatory practices. While § 1863 provides for use of voter lists, it also contemplates resort to supplementary sources where necessary to foster the policies of Sections 1861 and 1862.

Memorandum for the United States, p. 9.

Moreover, numerous appellate courts have held that the Act (and its predecessor) require that affirmative measures be taken by jury officials to assure the cross-sectional goal of both the statutes and the Constitution. Cf., *United States v. Fernandez*, 480 F. 2d 726, 733 (2nd Cir. 1973); *Mobley v. United States*, 379 F. 2d 768 (5th Cir. 1967); *Rabinowitz v. United States*, 366 F. 2d 34, 57 (5th Cir. 1966). In *Fernandez, supra*, for example, the court found that:

> The Jury Selection and Service Act [of 1968] goes beyond prohibition of "intentional" distortions and provides that in certain cases affirmative measures must be undertaken to insure that "juries" [are] selected at random from a fair cross-section of the community.

480 F.2d at 733 (citations omitted). The court noted in *Fernandez* that the defendant's evidence of statistical variance between the community and jury pool compositions was excluded erroneously by the lower court even though the variance was not alleged to have resulted from "systematic discrimination." 480 F.2d at 732.

Numerous courts interpreted the 1968 Act's predecessor legislation to include an affirmative action requirement, even though it lacked the specific supplementary language found in the present Act's §1863. See 71 Stat. 638 (Sept. 9, 1957). For example, in *Mobley v. United States, supra*, the court noted:

> There is, therefore, an affirmative duty imposed by the Constitution and the laws of the United States upon the jury selection officials . . . to know the availability of potentially qualified persons within significant elements of the community, including those which have been the object of state discrimination, *to develop and use a system that will result in a fair cross section of qualified persons in the community being placed on the jury rolls* and to follow a procedure which will not operate to discriminate in the selection of jurors on racial grounds.

379 F.2d at 772 (emphasis added). See also, *Rabinowitz v. United States, supra,* 366 F.2d 34, 57, 73. At least one court has refused in its consideration of jury challenges to acknowledge or rely upon what it finds to be the "technical distinction" between the so-called affirmative duty of jury officials to secure a fair cross-section and the allegedly lesser due not to discriminate. *United States v. Zirpolo,* 450 F.2d 424 (3rd Cir. 1971).

The courts further have noted that the Act's designation of voter lists as the initial source of jurors in no way diminishes the affirmative requirements of § 1863. As stated by one panel of the Fifth Circuit:

> The use of voter list [sic] is not the end sought. Rather, that is the principal source. If the source is deficient or infected its use alone will not suffice.

Broadway v. Culpepper, 439 F.2d 1253, 1257 (5th Cir. 1971). And Judge Wyzanski has flatly con-

demned the failure of federal courts to order supplementation of voter lists in the face of overwhelming evidence of their failure to reflect properly the community composition.

> It has been thought, at least in recent times, that a defendant, whether black or white, young or old, poor or rich, is entitled to a jury drawn from a pool which is an approximation of a cross section of the community, and from which no substantial group or class has been purposefully excluded.
>
> * * *
>
> The defendant has the right, it would therefore seem, not to have the pool diminished at the start by the actions or inactions of public officials, nor by the inertia, indifference, or inconvenience of any substantial group or class who do not choose to vote or to serve on juries. From the viewpoint of a black, or young, or poor, or rich defendant, his interest is in having a pool with a fair proportion of blacks, young, poor, and rich. To him it is a matter of indifference as to whether a diminished pool is due to action or inaction of third persons, whether public or private. In substance, the defendant is entitled to require that the public officials charged with jury selection, including judges who excuse jurors, proceed in such a way as to compel the calling of all eligible for jury duty who do not have socially valid excuses. In this connection jury duty is an obligation owed to the defendant, not a privilege which at the juror's pleasure the juror may choose to exercise or forego.

United States v. Burkett, 342 F. Supp. 1264, 1265 (D. Mass. 1972). See also *United States v. Zirpolo*, 450 F. 2d 424 (3rd Cir. 1971).[21]

The petitioner in the instant case made a timely motion under § 1867 (a) of the Act, accompanied by a sworn statement alleging substantial underrepresentation of Mexican Americans in the jury pool. The full extent of this underrepresentation could not be ascertained, of course, without disclosure of the requested jury records. Cf., *Mobley v. United States*, *supra*, 379 F.2d at 172 The alleged underrepresentation constitutes a clear violation of the affirmative requirements of the Act. Therefore, under the express terms and clear intent of the Act, as reflected in both its legislative history and its judicial enforcement, petitioner clearly was entitled to discovery of jury records pursuant to § 1867 (d) and (f) and to a hearing on his contentions.

B. Petitioner's Showing of Substantial Underrepresentation of Mexican Americans in the Jury Pool Establishes a Prima Facie Case of Systematic Exclusion of this Group in Violation of the Act and the Constitution.

Assuming *arguendo* that a violation of the Act must be predicated upon a showing of "systematic exclusion" of Mexican Americans from the jury pool, petitioner's allegations of underrepresentation nevertheless established a *prima facie* case of statutory and constitutional violation. The so-called "systematic exclusion" test originally evolved from this Court's consideration of state jury selection statutes which, although facially constitutional, had been unconstitutionally applied to exclude Blacks.[22] *See, e.g., Norris v. Alabama*, 294 U.S. 587 (1935) (total exclusion of Blacks); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Whitus v. Georgia*, 385 U.S. 545 (1967) (substantial exclusion of Blacks.)

[21]For a discussion of the underrepresentation of Mexican Americans on the voting rolls, see Appendix "A" to this brief, infra, pp. i-iii.

The "systematic exclusion" rule originally was based upon the probable prejudice sustained by a minority defendant whose racial group was substantially excluded from the jury pool. Thus, no showing of actual prejudice was required of a defendant alleging substantial exclusion of his or her group from the jury pool.

In 1946, the Court extended to federal litigants the right to challenge the systematic exclusion of any identifiable group, pursuant to the Court's supervisory power to assure the fair administration of justice in the federal courts. *Thiel v. Southern P. Co.*, 328 U.S. 217 (1946). In 1972, the right to a fairly constituted cross-sectional jury pool was held to be a due process right of all citizens. *Peters v. Kiff*, 407 U.S. 493, 501 (1972). Hence, any litigant has standing to challenge the systematic exclusion of any identifiable group without a showing of actual prejudice.

A *prima facie* case of unconstitutional systematic exclusion has long been held to be established by a showing of persistent statistical disparity between the

[22]The Court had already struck down exclusion of Blacks which was authorized by state statute. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

proportion of an identifiable group in the total population of the community and the proportion that the group bears to the total eligible for jury service. *Alexander v. Louisiana,* 405 U.S. 625 (1972); *Smith v. Texas,* 311 U.S. 128 (1940). Thus, in 1954, the Court held that Mexican Americans constituted a separately identifiable ethnic minority subject to the protection of the Fourteenth Amendment. *Hernandez v. Texas,* 347 U.S. 475 (1954). *See also, Keyes v. School District No. 1,* 413 U.S. 189 (1973). In examining evidence demonstrating that over a period of twenty-five years no Mexican American had served on any jury in a county with a sizable percentage of Mexican American residents, the Court in *Hernandez* found that a *prima facie* case of unlawful systematic exclusion of Mexican Americans had been established. *See* also, *Muniz v. Beto,* 434 F.2d 697 (5th Cir. 1970).

Contrary to the apparent assertion of the Solicitor General in this case,[23] a showing of discriminatory intent on the part of government officials is not a necessary element of the constitutional violation. As early as 1942, the Court rejected the argument that good faith on the part of jury selection or other officials vitiated a claim of systematic exclusion in the federal courts:

> Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted. That the motives influencing such tend-

[23]Memorandum for the United States, pp. 8-10.

> encies may be of the best must not blind us to the dangers of allowing any encroachment whatever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

Glasser v. United States, 315 U.S. 60, 86 (1942).[24]

As more recently stated by the Ninth Circuit:

> When a jury selection system actually results in master jury panels from which identifiable classes are grossly excluded, the subjective intent of those who develop and enforce the system is immaterial. . . . The lack of specific intent to discriminate . . . cannot offset the grossly discriminatory effect of . . . [the] jury selection process.

Carmical v. Craven, 457 P.2d 582, 587 (9th Cir. 1971).

In applying the systematic and purposeful exclusion test to jury challenges under both the 1968 and 1957 juror selection acts, appellate courts consistently have adopted this result-oriented approach. These cases stand for the proposition that a juror selection system which persistently produces substantial underrepresentation of an identifiable group is invalid under the Constitution and the juror selection statutes. For example, in the 1970 case of *Muniz v. Beto,* 434 F.2d 697 (5th Cir. 1970), the court considered evidence purporting to shew substantial underrepresentation of Mexican Americans on grand juries, 434 F.2d 697 (5th Cir. 1970). In finding the jury pool to be illegally constituted, the court held:

[24]See *Rabinowitz v. United States,* 366 F. 2d 34 (5th Cir. 1966); *United States ex rel. Seal v. Wiman,* 304 F. 2d 53, 65 (5th Cir. 1962); *United States v. Butera,* 420 F. 2d 564, (1st Cir. 1970); *Davis v. Davis,* 361 F. 2d 770, 773 (5th Cir. 1966).

> The *results* of the jury selection process are what count, and the results in this case clearly show discrimination against Mexican Americans in the selection of grand jury members.

434 F.2d at 705 (emphasis in original).[25]

Other systematic exclusion cases arising under the 1957 statute dispel the notion that affirmative discrimination must be proven to be the cause of any underrepresentation which exists. *See, Rabinowitz, supra,* where the Fifth Circuit held, with regard to a "key man" system:

> If a fair cross section is consistently lacking then, without more, it is established that the [jury] commissioners have failed in their duty.

366 F.2d at 58.

Accord: *United States v. Fernandez,* 480 F2d 726 (2nd Cir. 1973); *Mobley v. United States,* 379 F2d 786 (5th Cir. 1967); *United States ex rel. Seals v. Wiman,* 304 F. 2d 53, 67 (5th Cir. 1962). See also, *United States v. Butera,* 420 F. 2d 564, 574 (1st Cir. 1970), where the court found that where the system at issue in that case (the "key man" system) persistently produced substantial and recognized underrepresentation of a sociologically distinct group, it was subject to attack even though valid on its face.

[25] A California state court recently quashed indictments issued from a grand jury which it found to underrepresent Black, Latin Americans, blue collar workers and the young. The Court stated:

> The Court is of the opinion that the means used by the selectors did not assure a fair representation of the group to which the moving Defendants belong . . . . The pool was not shown to represent a cross-section of the community.

California v. Bingham, Civ. No.-4094, January 17, 1974. *See also, Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142, 150 (5th Cir. 1972); *United States v. Texas Education Agency,* 467 F.2d 848, 865 (5th Cir. 1972).

The principle underlying the pre-Act "key man" system cases clearly governs the application of the "systematic exclusion" test to post-Act cases. As noted earlier, the fact that under the Act voter lists are used to provide the initial juror pool cannot be held to diminish or in any way to affect constitutional and statutory rights to a jury drawn from a fair cross-section of the community. See, e.g., *Broadway v. Culpepper,* 439 F. 2d 1253, 1257 (5th Cir. 1971); *United States v. Burkett,* 342 F. Supp. 1264, 1265-66 (D.Mass. 1972). Under the "key man" cases, the constitutional and/or statutory violations were not defensible on the grounds that the jury officials did not intend their system to discriminate against the excluded classes. Cf. *Rabinowitz v. United States,* 366 F. 2d 34 (5th Cir. 1966). The same principle must hold true in cases challenging persistent and substantial underrepresentation under the voter list system. Petitioner's allegation of 50% underrepresentation of the Mexican American community on the jury lists undeniably establishes a *prima facie* case of systematic exclusion of this group in violation of the Act and the Constitution and triggers the provisions of § 1867 of the Act. Denial to the petitioner of access to those records and of a hearing on his motion effectively nullifies petitioner's basic constitutional and statutory rights.

Even if petitioner should be denied relief under the Act, his contentions nevertheless require that this Court remand the case for an evidentiary hearing,

allowing him access to the records necessary to substantiate his claim. *Mobley v. United States,* 379 F.2d 768 (5th Cir. 1967); *United States v. De Alba-Conrado,* 481 F.2d 1266 (5th Cir. 1973). In *De Alba-Conrado* the defendant failed to comply with the procedural requirements of the Act in making a jury challenge. Nevertheless, the court found that the challenge presented sufficient constitutional implications to require a remand with directions that all necessary proceedings, including discovery of jury records, be held to allow the complete and fair review of the defendant's contentions that the jury pool was illegally constituted. The court stated that:

> The necessity for the remand arises from the total lack of development in the court below of the pertinent facts necessary to a resolution of the crucial issue asserted here.

481 F.2d at 1270. This Court should find similarly that the constitutional dimensions of the issue asserted by petitioner herein require remand for discovery of relevant jury records and for a full evidentiary hearing.

II. EVEN IF PETITIONER'S STATUTORY OR CONSTITUTIONAL CLAIMS WERE TO FAIL THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PERMIT PETITIONER ACCESS TO JURY RECORDS AND AN OPPORTUNITY TO BE HEARD ON HIS CONTENTIONS OF UNDERREPRESENTATION

Even were the petitioner not entitled to jury documents or to a hearing on his contentions under either the Act or the Constitution, this Court would nevertheless have the power to grant petitioner relief under its supervisory power over the administration of justice in the federal courts. This power has long been invoked by the Court in its efforts to protect and implement the fundamental right to juries chosen from a fair cross-section of the community. *Thiel v. Southern P.Co.,* 328 U.S. 217 (1946). In the exercise of this power and duty to assure the fair administration of justice in the federal judiciary, this Court may impose fairness requirements over and above the constitutional requirements of equal protection and due process of law. *Fay v. New York,* 332 U.S. 261 (1947); *United States v. Butera,* 420 F. 2d 564, 568 (1st Cir. 1970).

Petitioner in the case at bar is confronted with a Catch-22 dilemma. He is told that he may not see the jury records because he has not made out a case, yet he cannot make out a case without access to the jury records. The problem is compounded by the petitioner's lack of financial resources,[26] which effectively prevents him from otherwise marshalling the comprehensive statistics necessary to prove up his claim. In view of the fundamental rights at stake, this Court must afford this petitioner, and others similarly situated, their only real opportunity to develop claims of substantial underrepresentation of identifiable groups. See, *Mobley v. United States,* 379 F2d 786 (5th Cir. 1967), where the appellate court found that the lower court erred in barring the defendant from

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[26]Order of the Supreme Court of the United States granting motion for Leave to Proceed in *Forma Pauperis,* June 17, 1974.

access to juror questionnaires in aid of a challenge of systematic exclusion. The court noted:

> The ratio of white to Negro jurors on the . . . lists is not known for the record is silent on the subject. It is precisely this information that the appellant seeks to present to the court in order to support his contention that there was a systematic exclusion of persons of his race from these lists.

379 F. 2d at 772.

CONCLUSION

For the reasons stated above, amicus curiae respectfully submits that the district court's denial of the opportunity to inspect the jury wheels should be reversed and the case remanded for a full evidentiary hearing on the merits of petitioner's claims.

Dated: September 6, 1974.

Respectfully submitted,

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(Appendix A Follows)

Appendix A

UNDERREPRESENTATION OF MEXICAN AMERICANS ON VOTING ROLLS

Clearly, the exclusive use of voter registration lists as the source of prospective jurors fails to provide a representative cross section of the community:

> It becomes doubtful whether voter registration lists are capable of producing juries representative of a cross-section of the community, in view of the fact that the lists exclude over 30 million people, a disproportionate number whom are members of the lowest socio-economic strata of society.

Linquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 Temple L. Q. 32, 49 (1967).

Furthermore, it has been recognized that "One of the biggest factors in this underrepresentative quality of voting lists . . . includes residency requirements as well as extra-legal restrictions such as discrimination or intimidation." Note, *Jury Selection Procedures: A Reform*, 6 Suffolk Law Rev. 865, 882. (1969).

That voter lists frequently fail to reflect a fair cross-section of the community is particularly true as to Mexican Americans. In 1970, this Court noted Congress' findings that while the Voting Rights Act of 1965 had an appreciable impact upon the voter registrations of Blacks, voter registration of Spanish Americans had remained very low. *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970). Mr. Justice Black observed that: "Congress also had evidence to show that voter

registration in areas with large Spanish American populations was consistently below the state and national averages." *Id.*, p. 132.

These congressional findings are further substantiated by the United States Census Report on voting and registration in the 1972 presidential election. The census statistics indicate that while 73.4% of all eligible Anglos registered to vote, only 44.4% of all eligible persons of Spanish origin registered to vote. (U.S. Bureau of Census, *Current Population Reports,* Series p. 20, No. 253, "Voting and Registration in the Election of November 1972," pp. 17-18, 22-23. These statistics reveal a serious situation with regard to the representation of Mexican Americans; in fact, the severity of the situation probably has been underestimated. The true dimensions of the disparity are not adequately measured because the 1970 Census was found to have undercounted Mexican Americans. Mexican American Population Commission of California, *Mexican American Population in California as of April 1973 With Projections to 1980: A Biannual Census Report,* p. 4-6 (1973); U.S. Commission on Civil Rights Report, *Counting The Forgotten: The 1970 Census of Persons of Spanish-speaking Background in the United States,* pp. iii-iv (1974). See *Confederacion de la Raza v. Brown,* 345 F. Supp. 909 (N.D. Cal. 1972).

These data take on special meaning in light of the provisions of the Federal Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, which specifies that the names of prospective jurors shall be selected

from voter registration lists or the list of actual voters and *"some other source or sources of names in addition to voter lists where necessary to insure the random selection from a fair cross-section of the community."* 28 U.S.C § 1863 (3) (emphasis added). Indeed, the Civil Rights Commission recommended that supplementation be required:

> . . . . whenever the proportion of Negroes on the last selected jury list is lower by 10% or more than the proportion of voting Negroes in the district from which the names for the master jury wheel are chosen.

Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals,* 20 Mercer Law Review 349, 374 (1969).

Notably, supplementation of voter lists is mandatory in the Uniform Jury Selection and Service Act which was approved in August 1970 by the National Conference of Commissioners on Uniform State Laws. A number of states, including Colorado, have adopted the Uniform Act. In approving the Act, the Commissioners noted that:

> The Uniform Act, as does the Federal Act, uses voting lists as the starting point; but voting lists are obviously incomplete, and the Uniform Act requires that they be supplemented from other sources to be designated by some rulemaking authority such as the State Supreme Court.

McKusick and Boxer, *Uniform Jury Selection and Service Act,* 8 Harv. J. on Legis. 220.